Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

PATRICIA J. MATASSARIN EX REL.,

Petitioner,

v

F.F. MIKE LYNCH ET AL.,,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

I. May a Domestic Relations Order be deemed "qualified" and thus exempt from ERISA preemption, if it violates the express terms of an ERISA Plan document and if it violates the stated Public Policy of ERISA?

II. Should Federal Securities Laws provisions be available to ESOP shareholders when ERISA Plan Administrators and Trustees violate their fiduciary duties and engage in self dealing at the expense of Plan participants and beneficiaries?

III. May an ERISA Plan beneficiary, who is also the attorney prosecuting the claim, be the Class Representative in a Class Action suit to recover benefits for sixty eight people residing in twelve different states?

IV. Do three written Orders promulgated by a District Court Judge which reflect ex parte, extra-judicial communications with unnamed parties and which are pejorative, wrongful and demeaning toward the Plaintiff personally, together with the failure to enter a Scheduling Order; the commencement of the entering of no evidence Summary Judgments within eight weeks of discovery opening; arriving at "gender biased" conclusions with no evidence; and refusing to grant Plaintiff reasonable time for discovery, indicate the "objective" bias/prejudice sufficient to mandate recusal under *Liteky v. U.S.* 114 S.Ct. 1754 (1997)?

LIST OF PARTIES TO THE PROCEEDING:

Patricia J. Matassarin, individually, and for and on behalf of The Great Empire Broadcasting Employee Stock Ownership Plan and its Beneficiaries; for an on behalf of that class of persons, participants and/or beneficiaries of The Great Empire Broadcasting Employee Stock Ownership Plan, past or present, defrauded.

Plaintiff(s)/Appellant(s)/Petitioner(s)

F.F. Mike Lynch, individually and as Trustee for The Great Empire Broadcasting Employee Stock Ownership Plan (ESOP); **Michael C. Oatman**, individually and as Trustee for The Great Empire Broadcasting Employee Stock Ownership Plan (ESOP); **Danny E. Jenkins**, individually and as former Trustee of the ESOP and Agent of the Trustees and Agent of the Administrator of The Great Empire Broadcasting Employee Stock Ownership Plan; **Great Empire Broadcasting, Inc**., individually and as a Plan Administrator for The Great Empire Broadcasting Employee Stock Ownership Plan; The Great Empire Broadcasting Employee Stock Ownership Plan "Administrative Committee"; **Karen K. Warner**, **Don T. Burford**, and **Curtis W. Brown** individually and as a members of the Great Empire Broadcasting Employee Stock Ownership Plan "Administrative Committee"; **Menke & Associates, Inc**.

Defendants/Appellees/Respondents

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit was issued on April 27, 1999 and reported at 174 F.3d 549. A copy of the opinion is set forth in the Appendix, p. 1a. A timely Motion/Suggestion For Rehearing was filed and denied on July 12, 1999. A copy of the Order denying re-hearing is set forth in the Appendix, p.78a The relevant opinions of the United States District Court for the Western District of Texas, San Antonio, are unreported and dated as follows: Order Granting Summary Judgment, November, 10, 1997 set forth in Appendix, p. 39a; Order Granting Great Empire Defendants' Motion For Partial Summary Judgment on Securities Law Claims, November 25, 1996 set forth in Appendix, p. 67a ; Order Granting Partial Summary Judgment, March 13, 1997 set forth in Appendix, p.58a; Order Denying Motion For Class Certification, December 4, 1996 set forth in Appendix, p 61a; and Order Denying Motion for Recusal, July 18, 1997, set forth in Appendix, p. 73a.

STATEMENT OF THE BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT:

Appellate Jurisdiction in the United States Supreme Court is conferred by virtue of 28 U.S.C § 1254. Jurisdiction in the lower United States District Court for the Western District of Texas, San Antonio, was conferred by ERISA, 29 U.S.. § 1001 et seq.

STATUTES INVOLVED:

29 U.S.C. §1056(d) (87a)
26 U.S.C. § 4975(e)(7) (89a)
26 U.S.C. § 409(h) (89a)

STATEMENT OF THE CASE:

Plaintiff/Appellant/Petitioner, hereafter Petitioner, filed suit individually and in a representative capacity to recover the true value of stock held by sixty eight people in the Great Empire Broadcasting Inc. Employee Stock Ownership Plan (hereinafter the "Plan"or "ESOP"). She contended that the Defendants violated the provisions of the ESOP Plan, ERISA and the Tax Code and Federal and State Securities provisions in establishing "segregated investment accounts" for herself and sixty seven "terminated" participants and that the Defendant fiduciaries intentionally alienated participants' and beneficiaries' benefits, undervalued benefits, financially gained from the undervaluation, breached their fiduciary duties and engaged in self dealing. The District Court eventually dismissed all of Petitioners' claims on Summary Judgment.

Thereafter, an Appeal was taken to the Fifth Circuit Court of Appeals. The Appellate Court affirmed the District Court in all respects in a published opinion filed on April 27, 1999.

Erisa Violations:

The Court of Appeals opined that even though the "qualified" domestic relations order (hereinafter "Q"DRO) mandated action which the Court found was "out of line from the greater goals of ERISA", that nonetheless the "Q"DRO controlled and the administrators were bound to follow its terms (*see* Appendix pg. 25a). The QDRO format was drafted by the Plan Administrator who mandated the language used as necessary to "qualify" the DRO under the terms of the Plan document(s). The Plan Administrators interpreted the "Q"DRO to require that the value of Petitioner's stock was to be frozen at the time of her divorce from Danny Jenkins, (then the Plan Administrator) on October 15, 1991; that the 1990 year-end valuation of $22.00 per share was to be applied to the 520.086 shares held by her; and that the amount total was to "accumulate" interest from 1991 until the time of Petitioner's retirement in or around 2015. No actual account was established, rather the "segregated investment account" was an accounting entry only.

Petitioner's stock and the stock of the sixty seven "terminated" participants had been taken from their individual, allocated and accrued "Company Stock Accounts" at the time of the divorce or termination from employment, and placed in a "suspense account" from which other active participants, including the fiduciary Defendants, purchased the stock at greatly reduced prices. For example, in 1995 approximately 13,000 shares

of stock which had been originally allocated to the individual "Company Stock Accounts" of Petitioner and the others, was taken from the "suspense account" and purchased by the Defendants and other "active" participants at rates ranging from $22.00 per share to $33.00 per share, despite the 1994 year-end value being $50.25. The "segregated investment account" holders who took distributions in 1995 were told that the lower valuations applied to *their* benefit. The *fiduciary* Defendants knew the stock was worth $50.25, when they were telling terminated participants in 1995 that the stock value ranged between $22 and $ 33 per share. The Court of Appeals did not adjudicate as to the propriety of the handling of the terminated participants accounts, because the Court found that Petitioner was an unsuitable representative. The Court, then reasoned that the "interest only" scenario pertaining to Petitioner's accounts did not violate the Prudent Person Investment Diversification Requirement argued by Petitioner to be mandated by ERISA and other Circuit precedent. Moreover, the Plan Document in existence at the time of a proposed distribution to Petitioner in 1995, required that her account be "treated the same as the affected accounts of the participant". The accounts of the participant, Danny Jenkins, indicated that his stock was valued year-end 1994 at $50.25 per share not the $22.00 per share that was offered to Petitioner and others. In addition, F.F. Mike Lynch had demanded and received from the ESOP $50.25 per share for 31,032 shares of stock that he sold to the ESOP in December, 1994. Six months later, however, he as Trustee, was offering a fraction of that amount to terminated participants and

beneficiaries. Jenkins' stock has continued to increase in value, as has the stock of Lynch, Oatman, Burford, Brown and Warner. Petitioner's stock, however, continues to be valued at the 1990 rate.

The stock has now increased to somewhere between $76.00 and $136.00 per share. Nonetheless, Petitioner's account is ordered to remain a "cash" account instead of a "stock" account and it is relegated to accumulating simple interest for twenty four years, despite the fact that all other "active" accounts are being given the benefit of the substantial increase in the value of the stock. Further, Petitioner is not entitled to a "distribution" and therefore cannot take her retirement money and "invest" it to obtain a better return.

The Defendants maintained for a period from May, 1995 through March, 1996 that Petitioner was entitled to a "distribution". After the matter had been litigated for approximately ten months, the Defendants changed their position and argued that Petitioner was *not* entitled to a "distribution". Defendants also failed to offer "distribution" of the benefit in the form of stock, which is required under the Tax Code and which is made a specific provision in the Plan Documents. The Court of Appeals found this violation to be a mere oversight.

The Court of Appeals opinion is vague and ambiguous as to the applied definition of "distribution", finding that Petitioner received a *distribution* via the creation of the "segregated investment account" but, then opining that

Petitioner is mistaken to believe that she is now entitled to a *distribution.* (See Appendix pp 19a,20a)

Class Representation:

The Court of Appeals opined that Patricia Matassarin was precluded from acting as a representative for the Class of sixty eight defrauded participants because she is an attorney and prosecuting the case and thus, there existed an actual or potential conflict of interest. Petitioner is aware of no other suits which have been brought to recover benefit values as of this writing. The Court also embraced a "gender biased" finding of the District Court, by opining that the determination by Judge Prado that Petitioner "might be more interested in hurting her ex-husband than in ensuring adequate representation for a class" (Appendix p. 8a) was not an abuse of discretion. Petitioner strenuously objected to the conclusion as being without *any* evidentiary basis.

Federal Securities Fraud:

The Court of Appeals upheld the District Court finding that Federal Securities Fraud claims were foreclosed because the ESOP Plan was " . . . not a voluntary investment choice, but instead a mandatory, employer-funded program." Petitioner argued that the ESOP Plan was both "voluntary" and "contributory" as a matter of fact and law and as a result, the reasoning applied in *Uselton v. Commercial Lovelace Motor Freight*, 940 F.2d 564 (10th Cir. 1991) should apply,

emphasizing that the lack of punitive damages under ERISA encourages breach of fiduciary duty and self dealing and eliminates a pool of adequate representation.

Recusal:

The Court of Appeals found that the District Court Judge's refusal to recuse himself was reasonable. Petitioner argued that three written Orders reflected that the Judge engaged in ex parte, extra judicial communications, resulting in pejorative, demeaning and wrongful allegations against Petitioner personally, which were made a matter of record. Petitioner also complained that Judge Prado refused to allow her adequate time for discovery and that he failed to enter a Scheduling Order (despite having required the parties to submit a proposed order) resulting in a premature series of summary dismissals of her various causes of action. Petitioner asserted that the written documentation, the failure to allow adequate discovery, the failure to enter a Scheduling Order, and the Judge's gender biased conclusions indicated, at the very least, "objective" bias/prejudice under *Liteky v.U.S.*, supra, and that Due Process considerations mandated that Judge Prado recuse himself.

CONSIDERATIONS GOVERNING REVIEW:

Review by the United State Supreme Court is warranted for the following reasons:

1. The Fifth Circuit's reasoning in *Matassarin ex rel., v. F.F. Mike Lynch et al.* 174 F.3rd 549 (5th Cir. 1999) is contrary to the antialienation and public policy pronouncements set out in *Boggs v. Boggs* 117 S.Ct. 1753 (1997) and *Varity Corp. v. Howe* 116 S.Ct. 1065 (1996); the antialienation pronouncements of *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 39 F.3d 1078 (10th Cir. 1994); the investment diversification requirement and fiduciary responsibilities reiterated in *Metzler v. Graham* 112 F.3d 207 (5th Cir. 1997) and *In Re Unisys Savings Plan Litigation* 74 F.3d 420 (3rd Cir. 1996); and the accrual and vesting provisions relating to "defined contribution plans" considered in *Izzarelli v. Rexene Products Co.* 24 F.3d 1506 (5th Cir. 1994).

2. There are considerable differences of opinion between and among the Circuit Courts as to:

(A) whether ERISA preempts all State laws that "relate" to an ERISA Plan; *see* *Smith v. Provident Bank* 170 F.3d 609, 615 (6th Cir. 1999) where Federal Court exercised removal jurisdiction from State court fraud claim opining that the label placed on a claim is not determinative, rather ERISA preempts claims for ". . . the recovery of an ERISA plan benefit" ; and *Fox v. Fox* 167 F.3d 880, 883 (4th Cir. 1999) where Federal Court exercised removal jurisdiction from State court QDRO claim concerning ex-husband administrator and his exercise of "discretion", finding that ERISA gives Plan administrators the power to qualify state DRO, but their interpretation(s) will not stand if they ". . . lo[se] sight of the mission of ERISA plans -- 'to

protect employee benefit plans and their beneficiaries'. . . ", citing 29 U.S.C. § 1001(b); and *Matassarin ex rel.*, supra

where The Court found that Matassarin should take her claim to State court if fraud induced the drafting of the "Q"DRO;

(B) whether State courts may or should determine whether a Domestic Relations Order is to be deemed "qualified" under ERISA or whether Plan Administrators are the proper persons to determine the "qualified" status of the DRO; compare *Fox* above with *Matassarin ex rel,* where the Court opined that ". . . we cannot say that a federal court's role extends as far as examining the circumstances under which a potential beneficiary entered and a state court *approved* a QDRO." and "ERISA does not require, or even permit, a pension fund to look beneath the surface of the order. Compliance with a QDRO is obligatory . . ." (*see* Appedix p. 26a) citing *Blue* v. *UAL Corp.* 160 F.3d 383,385 (7th Cir. 1998); compare to *Samaroo v. Robichaud* ___ F.3d ____, 1999 WL 744019 at page 4 (3rd. Cir. (N.J.) 1999) where the Third Circuit dealt with a QDRO and removal issue opining that an amended QDRO entered nunc pro tunc to the date of divorce was not a "qualified" DRO stating, " . . . A domestic decree that would have the effect of . . . [providing a form of benefit not otherwise available under the plan] . . . is not a QDRO, no matter what the decree's status under state law."; and *see* *Nasco v. Peoplesoft* _____ F.3d _____, 1999 WL 649647 at page 7 (N.D. Cal. 1999) where the District Court wrestled with an ERISA preemption/QDRO removal issue opining that

> " . . . If the state court orders defendant to pay benefits to plaintiffs in a manner that defendant believes to be inconsistent with federal law, i.e., if the DRO is not a **QDRO** , defendant may then have a valid claim that the state order is in conflict with federal law and that controversy may be removable under conflict preemption. See 28 U.S.C. § 1132(e)";

(C) whether the liberal discretion afforded Plan Administrators who have "discretion" to interpret Plan documents enables them to ignore Plan provisions and ERISA public policy in exercising their "discretion"; and importantly, whether 29 U.S.C. § 1056, in effect, removes from ERISA preemption any and all Domestic Relations Orders, even those that violate specific Plan provisions and ERISA public policy, if they are labeled "Qualified"; again, see *Fox, Nasco, Matassarin ex rel, Blue and Samaroo above.*

3. The precedent established in *Matassarin ex rel. v. F.F. Mike Lynch et al*, supra will have a resounding impact on a large population. The decision encourages disregard for the protections and policies of ERISA, thus increasing the potential for negative impact on the retirement benefits of people who, realistically, do not have the wherewithal to effectively challenge fiduciary impropriety.

4. Petitioner respectfully states that the affirmation by the Fifth Circuit of Judge Prado's refusal to recuse

himself, under the circumstances of this case, will detrimentally impact the ability of ERISA participants and beneficiaries to retain counsel and works to diminish the credibility of the Federal Judicial System.

ARGUMENTS AND AUTHORITIES:

I. A Domestic Relations Order which is contrary to the express terms of an existing Plan Document and which is contrary to the Public Policy of ERISA, may not be deemed "qualified".

The Great Empire Broadcasting, Inc. Employee Stock Ownership Plan was created by virtue of a Plan Document executed in October 1988 but "retroactive to January 1, 1988". The Plan is a "defined contribution" or "individual account" plan. (See the Application For Determination for Defined Contribution Plan dated 10/21/88 included herewith as a Lodging). Shares of stock were "allocated" to the individual accounts of participants. Participants were provided with year-end Summaries which indicated the number of "shares" of stock allocated to the "Company Stock Accounts" of each. This suit involves the wrongful handling of the Company Stock Accounts of Petitioner and sixty seven other "terminated" participants who left their employment with Great Empire between 1989 and 1993.

The Plan was amended in and around November, 1994 as a result of Tax Code changes in 1986. Due to a delay in promulgation of the changes, Plans were given until

year-end 1994 to amend or risk disqualification of the Plans back to January 1, 1989. Both the Original and the Amended Great Empire ESOP Plan specified that the ESOP was intended to be a stock ownership plan subject to the provisions of "Section 4975(e)(7) of the [Tax] Code". The Code, 26 U.S.C. § 4975(e)(7) specifies that a Plan shall not be treated as an Employee Stock Ownership Plan " Unless it meets the requirements of Section 409(h) . . . " 29 U.S.C. §409(h) *Right to demand employer securities*: *"put" option* - provides that in order for the ESOP to obtain tax exempt status, that it **must** allow Participants and Beneficiaries to " . . . demand that his benefits be distributed in the form of Employer Securities . . . ". The section further mandates that the " . . . Employer repurchase Employer Securities under a fair valuation formula." Both the Original and Amended Plans incorporated provisions pertaining to the valuation and "distribution" of benefits which had the effect of complying with the required Code provisions.

In May of 1995 Trustees Lynch and Oatman sent letters to "terminated" participants, those who left their employment with Great Empire between 1989 and 1993, indicating that the "Administrative Committee" had authorized lump sum distributions to "segregated investment account" holders. The letters included representations as to the value attributed by the Trustees to the accounts. A problem arose when Petitioner learned that the value of stock in Great Empire had increased significantly during 1994, yet, the statement sent by the Trustees in May 1995 did not reflect the increase in

her Company Stock Account. She then spent a year communicating with the Trustees and others at Great Empire trying to discern the reason for the discrepancy.

The explanation given by Great Empire, was that upon termination of employment or the entry of a "Q"DRO, the Company Stock Accounts of participants were converted to "cash" accounts; that the stock previously allocated to the individual accounts was removed from the accounts and placed in a "suspense account" and the value of the stock at the time of termination (or "Q"DRO) was applied to the cash accounts which were allowed to "accrue" interest at a pass book rate until "distribution". So, if you left employment with Great Empire, say in 1991, your stock account was given the year-end 1990 value of $22.00, converted to a cash journal entry, as no *actual* accounts were established by the Plan, and then at the time of distribution, i.e.; at the time of retirement, the Plan would calculate the amount of interest for the period of time the cash accounts were journalized until actual distribution occurred.

Additional difficulty arose when **(1)** Petitioner obtained a copy of the Plan Documents and found that the Amended Plan Document specified that the accounts of a "Q"DRO beneficiary ". . . were to be treated the same as the affected accounts of the participant". Petitioner's account was *not* treated the same as the affected accounts of Jenkins, her former husband, whose benefit continued to be comprised of a "Company Stock Account" which was enjoying the

significant increase in the value of its shares; **(2)** when Petitioner reviewed in detail, Section 14. WHEN PLAN BENEFIT WILL BE DISTRIBUTED of both the Original and Amended Plan Documents, both of which called for "valuation" of "All accounts, *including the Company Stock Account*" as of the "Anniversary Date coinciding with or immediately preceding the date of *actual distribution* of Plan Benefits." The Company Stock Accounts of Petitioner and sixty seven other terminated participants were not being "valued" as of the Anniversary Date, i.e.; December 31, 1994, when "actual distributions" were offered to the group in May 1995; **(3)** when Petitioner could find no provision in either the Original or Amended Plan Documents which authorized the establishment of "segregated investment accounts" ; and **(4)** when Petitioner reviewed the definitions of "Participant" in both Plan Documents. The Original Plan provided that a participant was "*Any Employee or former Employee who is participating in this Plan.*" The Amended Plan Document provided that a participant was "*Any Employee who is participating in this Plan as defined in Section 3 of the Plan or former Employee for whom an Account is maintained. A Participant ceases to be a Participant when such Participant's Account is closed after all amounts have been distributed or Forfeited".* The Plans made no distinction between "active" and "terminated" participants. Nevertheless, Petitioner was simply told that the "Q"DRO governed her benefit and that it called for the treatment that her account received. Suit followed in May 1996.

Petitioner was divorced from Danny Jenkins in October 1991. Jenkins was a Trustee at the time of the divorce and at the time that a "Q"DRO was requested of Petitioner by Jenkins, who provided the format that he contended *had* to be used to "qualify" the DRO under the provisions of the Plan. The "Q"DRO also indicates that Jenkins was the "Plan Administrator" at the time of the drafting and entry of the "Q"DRO. (See a copy of the "Q"DRO included herewith as Exhibit 84a).

This Court in *Boggs v. Boggs*, 117 S.Ct. 1754 (1997) established that ERISA preempts state laws when in conflict with ERISA. "A domestic relations order must meet certain requirements to qualify as a QDRO." Id. at 1763. The *Boggs* Court had the following to say in regard to the public policy behind the QDRO mechanism:

> " . . . These provisions are essential to one of ERISA's central purposes, which is to give enhanced protection to the spouse . . . in the event of divorce." Id. 1763
>
> . . .
>
> ". . . The QDRO provisions protect those persons who, often as a result of divorce, might not receive the benefits they otherwise would have had available during their retirement as a means of income." Id. 1767

This Court in *Varity Corporation v. Howe*, 116 S.Ct. 1065 (1996) opined the following in regard to fiduciary duty:

> " ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection. Id. at 1070
>
> . . .
>
> ERISA requires a "fiduciary" to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."
>
> . . .
>
> To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money . . . is not to act "solely in the interest of the participants and beneficiaries." As other courts have held., "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA." . . .
>
> . . .
>
> . . . duty of loyalty requires trustee to deal fairly and honestly with beneficiaries. . . .
>
> . . . We can find no adequate basis here, in the statute or otherwise, for any special interpretation that might

> insulate [defendant], acting as a fiduciary, from the legal consequences of the kind of conduct (intentional misrepresentation) that often creates liability even among strangers. Id. at 1075

The District Court and the Fifth Circuit found that the "Q"DRO format required by the Plan Administrator controls the treatment of Petitioner's benefit account. The result of that control, however, is contrary to the express policy of ERISA in *protecting* the ex-spouses of participants and contrary to the Plan documents. Here, Petitioner has been penalized for following the direction of the Plan Administrator, a person who owed her a fiduciary duty. It is well settled that the provisions of 29 U.S.C. § 1056(d) were added for the express purpose of allowing the alienation of participants' benefits so that ex-spouses could obtain a portion of retirement benefits earned during the course of the marriage. The section provides an exception to the strict preemptive antialienation provisions of ERISA, *not an exception to ERISA's protections.* The Fifth Circuit interpretation of the provision, however, is that §1056(d)(3)(C) excepts or removes a QDRO beneficiary's retirement benefit from the ambit of ERISA protection. No other Circuit has taken such a bold and far reaching position.

The Third Circuit in *Samaroo v. Robichaud*, supra conflicts with Matassarin ex rel. by opining that "A domestic decree that would have the effect of increasing the liability of

the Plan over what has been provided in the Plan (read in light of federal law) is not a QDRO, no matter what the decree's status under state law." See 1999WL 744110 at page 3. If a "Q"DRO conflicts with federal law, then it is not "qualified".

A District Court in the the Northern District of California found in *Nasco v. Peoplesoft*, supra, that "If the state court orders defendant to pay benefits to plaintiffs in a manner that defendant believes to be inconsistent with federal law, i.e., if the DRO is not a **QDRO**, defendant may then have a valid claim that the state order is in conflict with federal law and that controversy may be removable under conflict preemption." See 1999 WL 649647 at page 6. Again, if a "Q"DRO conflicts with federal law, then it is not "qualified".

The Fourth Circuit in *Fox v. Fox*, supra, found that a Plan Administrator abused his discretion when he refused to review a DRO in consideration of the "mission" of ERISA; "Mr. Fox's rigid definition loses sight of the mission of these ERISA plans -- 'to protect . . .the interests of participants in employee benefit plans and their beneficiaries." 167 F.3d at 883. If the purpose of the DRO is in conflict with ERISA policies, i.e.; the "mission" of ERISA, it may not be "qualified." It logically follows that if a Plan Administrator mandates that a DRO be in conflict with the "mission" of ERISA, the DRO is not "qualified".

Matassarin ex rel. is in contravention to the Prudent Person Investment Diversification Requirement articulated in a prior Fifth Circuit case, *Metzler v. Graham*, supra which embraced the Third Circuit's reasoning in *In Re Unisys Savings Plan Litigation*, supra, as follows:

> To establish a violation, a plaintiff must demonstrate that the portfolio is not diversified 'on its face.' . . . Once the plaintiff has established a failure to diversify, the burden shifts to the defendant to show that it was 'clearly prudent' not to diversify." *see Metzler* at pg.209

The *Matassarin ex rel.* Court did not find that a shift of the burden of proof was mandated and found that the prudent person requirement pertained to "downside" risk only (Appendix p.24a). As a result Petitioner's account is left undiversified and accruing simple interest for twenty four years. If that was the prevailing standard, then all Plan Administrators would eliminate the potential for litigation by simply placing all pension benefits in insured deposit accounts, instead of incurring investment risk.

The Defendants' actions in removing the stock from the Company Stock Accounts of Petitioner and sixty seven others is "alienation" of the benefit which is strictly prohibited by ERISA. In *Izzarelli v. Rexene Products Co.*, supra, note 16 at page 1515, the Fifth Circuit found that for defined contribution plans, like the ESOP at issue, " . . . the key is when a contribution becomes part of--is <u>allocated</u> to--a

participant's account. . . .accrued benefit in a defined contribution plan is the balance allocated to [a participant's] individual account." Approximately 13,000 shares of stock were removed from the vested accounts of sixty eight people, placed in a suspense account, and then purchased by others, including the fiduciary Defendants. There is no authority for such action. The individual Company Stock Accounts contained "allocated" shares of stock which were deemed "accrued". *Boggs v. Boggs*, supra at page 1765 defined "alienation" as follows:

> "[a]ny direct or indirect arrangement whereby a party acquires from a participant or beneficiary" an interest enforceable against a plan to "all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary." . . .

The Defendants acquired directly and indirectly the allocated and accrued stock that belonged to terminated participants and Petitioner. They acquired that stock at $22 to $33 per share when they knew the stock was worth $50.25. That stock has now risen to as much as $136 per share. The Defendants, thusly, have acquired a part of a plan benefit payment, contrary to antialienation policy.

II. Federal Securities Laws provisions should be available to ESOP shareholders when ERISA Plan Administrators and Trustees violate their fiduciary duty and engage in self dealing at the expense of Plan Participants and Beneficiaries.

The Fifth Circuit found that State Securities laws were most probably applicable to cheated ESOP stock holders (except Petitioner). Petitioner's Federal Securities Fraud claim was based primarily on the analysis and reasoning of *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564 (10th Cir.) *cert. denied*, 112 S.Ct. 589, 116 L.Ed.2d 614 (1991) in which the Court addressed the "voluntary" and "contributory" factors that apply to determinations as to whether certain transactions should reasonably come under the purview of Federal Securities laws. Petitioner argued that the "voluntary" factor was established by the fact that the Plan provided that anyone who was subject to a collective bargaining agreement was not eligible for participation in the ESOP, thereby establishing that participation was a voluntary choice. Participation was not available to those who chose union affiliation. Petitioner argued that the "contributory" factor was supported, under the *Uselton* analysis, by agreement to provide work in exchange for a benefit. This position was supported by the testimony of two Defendants, Jenkins and Warner, who both said that they considered the ESOP benefit to be a "substantial" part of their compensation packages.

In addition, the Plan documents provide for the payment of dividends which may be placed in individual "other investment accounts" and used to purchase additional shares of stock -- or distributed directly to the participants. In fact, the "other investment account" money of active participants was what was used to purchase the 13,000 shares of stock in 1995.

This Court in *Reves, et al., v. Ernst & Young*, 110 S.Ct 945, 108 L.Ed.2d 47, 494 U.S. 56 (1990) set out the following in a case where the question presented was whether an instrument should be considered a "security":

> ". . . an instrument bearing the name "stock" that, among other things, is negotiable, offers the possibility of capital appreciation, and carries the right to dividends contingent on the profits of a business enterprise is plainly within the class of instruments Congress intended the securities laws to cover."
> (see 494 U.S.62)

Clearly, the stock held by Great Empire ESOP participants and beneficiaries is a "security". The question posed, and that addressed in *Uselton*, is whether ERISA provides sufficient protection to ESOP stockholders such that Federal Securities provisions are not warranted. Generally, securities governed by ERISA are exempt from the purview of Federal Securities laws. The justification for such a measure has been that ERISA provides sufficient protection and therefore additional protective provisions are not just nor needed. The *Uselton* Court, however, considered the fact that State Securities laws are specifically exempted from ERISA preemption and inferred therefrom that Congress intended to leave traditional securities protections in place, finding that the main question to be answered, is whether ERISA provides sufficient protection in a securities context.

Petitioner emphasizes that this case is a testament to the impotence of ERISA in connection with ESOP securities.

ERISA does not provide for the recovery of any non contractual damages, punitive damages, nor mandate fees for a prevailing party. So, Plan fiduciaries can breach the provisions of the Plan, ERISA and the Tax Code, wait to see whether a claimant discovers the breach and whether he/she has the wherewithal to challenge the breach in Court, inundate the claimant with teams of lawyers, and risk only having to pay the claimant what should have been paid to him/her in the first place. Such a scenario invites breach of fiduciary duty, misdealing, and fraud. The average participant is unlikely to discover that a breach has occurred. If he/she suspects a breach, the chances of challenging it in Court are slim to none. Lawyers will not take these cases on a contingent fee or fee recovery contingency because of the soft fee shifting statute under ERISA and/or the amount at issue. ". . . ERISA is a 'comprehensive and reticulated statute.' . . . ' and is enormously complex and detailed." *see Hughes Aircraft Co. v. Jacobson* 119 S.Ct. 755 (1999). Put simply, fiduciaries can make off with substantial amounts belonging to their charges and face little if any consequence.

III. ERISA policies should allow Petitioner to represent the Class of defrauded participants.

Petitioner was disallowed the opportunity to represent the Class of persons defrauded because she is also the attorney prosecuting the case. Generally, Courts disallow such a scenario because of the risk of a conflict of interest. In the ERISA context however, especially in the context of this case, an exception should be made. Petitioner made it clear that she attempted to retain other counsel. The cost was prohibitive. The Defendants are wealthy and can put up a stringent defense. The first four months of the litigation in this matter involved a protracted jurisdiction and venue challenge, which would have cost the average litigant tens of thousands of dollars -- before reaching the merits of the claims.

Participants were cheated out of amounts ranging from $500 to $25,000. The cost of litigation alone, not including attorneys fees, prohibits obtaining judicial remedies for all but a very few. ERISA standing requirements operate as a safeguard to the uncontrolled generation of lawsuits. A lawyer cannot go out and purchase ESOP stock so as to give themselves standing to pursue a claim. Given the complexity of ERISA, the fact that Petitioner is an attorney, is the only reason that the breaches were discovered and uncovered. ERISA policy and the interests of the Great Empire ESOP participants and beneficiaries are not advanced by disallowing representative status, based upon a fictionalized possibility. The case has already been effectively litigated. What, if any, risk is there to the sixty seven people who were deprived of 50% of the value of their benefits, if representative status is conferred upon the

Petitioner and Class Certification is granted? Allowing representative status to attorneys in an ERISA context works to advance ERISA public policy, works to protect the interests of participants and beneficiaries, decreases litigation costs and makes efficient use of the Courts.

IV. Judge Prado's actions and omissions indicated personal bias/prejudice against Petitioner and thus demonstrated, at the least, "objective" bias such that he should have recused himself.

Three of Judge Prado's written Orders reflect that he engaged in ex parte, extra judicial communications with unnamed parties which were pejorative, wrongful and demeaning toward Petitioner personally. The first was a "Show Cause" order threatening dismissal of Petitioner's suit in November, 1996. (See 80a) The Judge ordered that Petitioner make application for admission to the Western District of Texas. She complied with his Order in a timely manner. Yet, the Judge issued an Order which set out that " . . . it had come to the Court's attention" that she had failed to comply. Petitioner could not determine how or why the Court's attention had been pricked when she had complied. The Order indicates that off the record communication occurred which was demeaning and prejudicial to Petitioner and her suit.

The second offending Order came about as a result of an inquiry by Petitioner to the Clerks office concerning a three week delay in sending an Order to her which struck her jury demand. The Order specified that Petitioner had

been "rude" to Court personnel and that she had "impugned the integrity of the Court", an allegation which required an immediate response. Petitioner vehemently denied that she had been rude and denied that she had impugned the integrity of the Court. (See a copy of the Order as Exhibit 82a). The Order clearly reflects that, again, the Judge engaged in ex parte, extra judicial communications with unnamed persons and that the communications were pejorative, personally demeaning, wrongful and prejudicial.

The third is an Order refusing recusal. It contains a seventeen line note which cites an ex parte, extra judicial discussion with an unnamed person which is wrongful, pejorative and demeaning. The body of the Order also makes reference to several other similar conversations between the Judge and unnamed persons.

Petitioner has no way to challenge erroneous conclusions drawn by a District Court Judge and then made a matter of record, when the basis for the conclusions are secret conversations with unnamed, unknown persons.

Judge Prado found that Petitioner was an unsuitable representative for a Class Action, concluding in part, that she was most probably more interested in hurting her ex-husband than advancing the interests of the Class. *Not one shred of evidence was produced which supported such a conclusion.* The conclusion is gender biased. It is unlikely that a male litigant's suit would be characterized

in such a manner. The Court wrongfully concluded that Petitioner's motivation was something other than the uncontroverted facts applied to Federal law.

Judge Prado also consistently failed to allow Petitioner reasonable time for discovery and commenced the granting of a series of no evidence Summary Judgments within eight weeks of discovery opening. Petitioner was repeatedly blind-sided by Motions for Summary Judgment because no Scheduling Order was ever entered in the case, despite the Judge having required the parties to submit a proposed Order in and around November, 1996. The most basic notions of Due Process mandate that a litigant have a reasonable, full and fair opportunity to prosecute their claims and that their suit be presided over by an impartial magistrate. The actions and omissions of Judge Prado indicate, at the *very least*, "objective" prejudice/bias such that he should have recused himself.

CONCLUSION:

By reason of the above and foregoing, Petitioner respectfully requests that this Court grant *certiorari* to review the important issues presented.

Respectfully Submitted:

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(any footnotes trail end of each document)

PATRICIA J. MATASSARIN, Individually, for and on behalf of The Great Empire Broadcasting Employee Stock Ownership Plan and its Beneficiaries; for and on behalf of that class of persons, participants and/or Beneficiaries of The Great Empire Broadcasting Employees Stock Ownership Plan, Past or Present, Defrauded, Plaintiff-Appellant, versus F.F. MIKE LYNCH, Individually and as Trustee for The Great Empire Broadcasting Employees Stock Ownership Plan (ESOP); MICHAEL C. OATMAN, Individually and as Trustee for The Great Empire Broadcasting Employees Stock Ownership Plan (ESOP); DANNY E. JENKINS, Individually and as former Trustee of the ESOP and Agent of the Trustees and Agent of the Administrator of The Great Empire Broadcasting Employees Stock Ownership Plan; Great Empire Broadcasting, Inc., Individually and as a Plan Administrator for The Great Empire Broadcasting Employees Stock Ownership Plan, and The Great Empire Broadcasting Employees Stock Ownership Plan "Administrative Committee"; GREAT EMPIRE BROADCASTING INC., Individually and as Plan Administrator for the Great Empire Broadcasting Employees Stock Ownership Plan; KAREN K. WARNER, CPA, Individually and as a member of the Great Empire Broadcasting Employees Stock Ownership Plan "Administrative Committee"; UNKNOWN MEMBERS OF THE "BOARD OF DIRECTORS", of the Great Empire Broadcasting Employees Stock Ownership Plan; MENKE & ASSOCIATES, INC.; DON T. BUFORD; CURTIS W. BROWN, Defendants-Appellees.

No. 97-51081

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COUNSEL:
For PATRICIA J MATASSARIN, Esq, Plaintiff - Appellant, Pro se, San Antonio, TX.

For F F MIKE LYNCH, MICHAEL C OATMAN, DANNY E JENKINS, GREAT EMPIRE BROADCASTING INC., KAREN K WARNER, CPA, DON T BUFORD, CURTIS W BROWN, Defendants - Appellees: W Wendell Hall, Fulbright & Jaworski, San Antonio, TX. Joseph B Friedman, Jr, San Antonio, TX. Robert Gilchrist Newman, Lucie Frost Webb, Fulbright & Jaworski, San Antonio, TX.

For MENKE & ASSOCIATES, INC, Defendant - Appellee: Michael Lamoine Holland, Cox & Smith Incorporated, San Antonio, TX.

JUDGES:
Before EMILIO M. GARZA, BENAVIDES, and DENNIS, Circuit Judges.

OPINIONBY:
BENAVIDES

OPINION:

BENAVIDES, Circuit Judge:

Plaintiff Patricia Matassarin appeals the district court's grants of summary judgment dismissing her ERISA and securities claims. We affirm.

I

In this unusual employee benefits matter, Patricia Matassarin, who is the plaintiff/appellant and the current plaintiff's attorney of record, brought suit against the Great Empire Broadcasting, Inc. ("Great Empire") employee stock ownership plan ("ESOP" or "Plan") and its fiduciaries and author. The Great Empire ESOP is subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), *29 U.S.C. § § 1001* et seq.

Until 1988, appellees Mike Lynch and Michael Oatman owned 75 and 25 percent of Great Empire, respectively. Great Empire established the ESOP effective January 1, 1988, by document executed on October 21, 1988, in order to distribute Lynch's and Oatman's shares more widely among Great Empire employees. The Plan was restated on November 15, 1994. The restatement, which brought the Plan into compliance with certain tax code provisions, was deemed retroactive to January 1, 1989. Appellee Menke & Associates, Inc. drafted the original documents establishing the ESOP and continues to provide ministerial services to Great Empire but does not serve as the Plan administrator. Every Great Empire employee who satisfies the ESOP's service requirements and who is not subject to a collective bargaining agreement automatically becomes a Plan participant. As Great Empire makes all contributions to the Plan, employee participants do not contribute directly.

Appellant Matassarin was married to appellee Danny Jenkins, Great Empire's chief financial officer and a participant in the Great Empire ESOP, until the couple divorced on October 15, 1991. Upon their divorce, Jenkins and Matassarin entered into a qualified domestic relations order ("QDRO"), which was approved by a Kansas state

court. Menke & Associates suggested the terms of the QDRO. Under the QDRO, Jenkins agreed to assign Matassarin one-half of his interest in the Great Empire ESOP. Great Empire would hold Matassarin's interest in a segregated account, where it would accrue interest at the rate of a one-year certificate of deposit. n1 The QDRO did not specify how long Great Empire would retain Matassarin's interest or when it would pay any distribution directly to her. Matassarin was represented by counsel when she agreed to the QDRO.

On the day of Jenkins's divorce from Matassarin, his Great Empire ESOP account held 1040.171 total shares. The Plan administrator segregated 520.086 of those shares into an account for Matassarin. The Plan administrator valued Matassarin's 520.086 shares at $ 22 per share, their market value at the end of 1990, the Plan's last determination date for value. Matassarin's interest in the Plan, thus calculated, totaled approximately $ 11,442. The Plan administrator then allowed Matassarin's account to accumulate interest at the rate of a one-year certificate of deposit.

When Great Empire restated its Plan on December 15, 1994, Michael Oatman sent a letter to everyone who had a segregated account under the original Plan. Most of the segregated-account holders, approximately sixty-seven people, were Plan participants who had left Great Empire's employment and had accounts established pursuant to Plan § 14(h). n2 The letter stated that the ESOP administrative committee n3 had authorized lump-sum distributions to segregated-account holders. The letter offered distributions either in cash or in shares of Great Empire stock. Matassarin contends that she never received this letter, and in any event she did not respond to it. Oatman sent follow-up correspondence to Matassarin and other segregated-account

holders in May 1995, n4 which reiterated the distribution offer but failed to mention that segregated-account holders could select shares of company stock as their form of distribution. The appellees now contend that Matassarin, unlike other segregated-account holders, was not entitled to any distribution and was sent Oatman's correspondence only in error. According to the appellees, § 18(e)(4) in both the original and the restated Plan provides that the Plan need not offer Matassarin any distribution until Jenkins is eligible for retirement. Section 18(e)(4) states: "In the case of any payment to an Alternate Payee before a Participant has separated from service, the Plan shall not be required to make any payment to an Alternate Payee prior to the date Participant attains (or would have attained) the Earliest Retirement Age." It is not clear from the record how many of the segregated-account holders received payment. For those who did, the Plan administrator converted the "suspended" stock, i.e., that in the segregated accounts, to cash value for distribution, then reallocated the stock among active Plan participants. For distribution purposes, the Plan apparently valued the suspended stock by the fair market value for whichever year-end preceded the relevant employee's termination from Great Empire employment. The Great Empire ESOP defines the "valuation date" as the December 31 "coinciding with or immediately preceding the date of actual distribution of Plan Benefits."

On May 9, 1996, Matassarin brought suit in the United States District Court for the Western District of Texas against Lynch, Oatman, Jenkins, Great Empire, Warner, Menke & Associates, and unknown members of Great Empire's Board of Directors. She alleged that the defendants committed common-law fraud and violated ERISA, federal securities laws, and state securities laws.

Matassarin filed a motion for class certification, with herself as the representative plaintiff, which the district court denied. She then filed a motion to have her suit treated as a shareholder's derivative action, or alternatively for joinder, or alternatively for reconsideration of the district court's decision denying class certification. The district court denied the motion in toto.

The district court then granted partial summary judgment against Matassarin on her federal securities claims against Lynch, Oatman, Jenkins, Warner, Great Empire, and Menke & Associates. Matassarin amended her complaint, adding Burford and Brown, members of the ESOP administrative committee, as defendants. The court granted partial summary judgment on Matassarin's federal securities claims against Burford and Brown, as well.

The court next granted partial summary judgment for all of the defendants on
Matassarin's fraud, conversion, and state securities claims. The defendants filed a motion for partial summary judgment on Matassarin's claim for attorneys' fees. The district court granted summary judgment with regard to any legal work done or supervised by Matassarin but denied the motion as to work done by other attorneys. n5

The district court then ordered Matassarin to file an amended complaint including only claims that still remained after the summary judgment grants. Matassarin did so, alleging only ERISA violations. The court thereafter struck Matassarin's jury demand and, in two separate orders, granted summary judgment for the defendants on Matassarin's ERISA claims, effectively ending her suit.

Matassarin also filed a motion requesting that Judge Prado, the presiding judge, recuse himself from the case on the basis of alleged bias. The judge denied the motion, prompting Matassarin to petition this Court for a writ of mandamus directing Judge Prado to recuse himself. A three-judge panel of this Court denied the petition and Matassarin's subsequent motion for rehearing on the issue.

Both Matassarin and the defendants filed motions seeking to recover attorneys' fees. The district court denied Matassarin's motion but, finding Matassarin's ERISA suit "frivolous," awarded more than $ 24,000 in attorneys' fees to Menke & Associates and more than $ 88,000 to the other defendants.

Matassarin now appeals the district court's refusal to certify her proposed classes; n6 the grants of summary judgment on her ERISA and securities claims; the striking of her jury demand; Judge Prado's refusal to recuse himself; and the denial of her motion for attorneys' fees. The district court awarded attorneys' fees to the defendants after Matassarin filed her first notice of appeal. As such, Matassarin contests that award as part of a separate appeal, No. 98-50473, which is not now before this Court.

II

Matassarin requested certification of three classes. First, she asked the district court to certify a class of all Great Empire ESOP participants, on whose behalf she sought to resolve "ambiguity between the Plan Documents, specifically, which Plan Document governs 'distribution' and 'valuation' decisions"; and "to unseat the [Plan] Trustees for fraudulent misrepresentations, conflict of interest, failure to comply with the Plan Document, and/or incompetence." Second, Matassarin sought to certify a class of all Plan beneficiaries who were offered lump sums for their segregated accounts. She contended that these beneficiaries were denied the fair

value of their interests and "have been the victims of misrepresentations concerning the fair value of their benefits and/or their ability to elect distribution in the form of stock." Finally, Matassarin sought certification for "QDRO beneficiaries whose valuations were frozen at the time of their divorces."

A district court has wide discretion in deciding whether to certify a proposed class. See *Applewhite v. Reichhold Chemicals, Inc., 67 F.3d 571, 573 (5th Cir. 1995).* So long as the district court considers the four Rule 23 criteria, n7 this Court will reverse the decision only if the district court abused its discretion. See *Lightbourn v. City of El Paso, 118 F.3d 421, 426 (5th Cir. 1997).*

The district court in this case did not abuse its discretion. The court mentioned and considered the Rule 23 prerequisites. Accurately considering Fifth Circuit precedent, the court found that Matassarin's "continuing and virulent antagonism" against defendant Jenkins, her prior litigation against Jenkins, her admission that she might bring another claim against the defendants, and her probable unwillingness to settle made her an inappropriate representative. Cf. Fed. R. Civ. P. 23(A). We see no abuse of discretion in this decision. Matassarin's pleadings make specific reference to information, presumably passed in confidence from spouse to spouse before the divorce, regarding Jenkins's motivation in helping establish the ESOP and his desire to benefit himself. Based on such pleadings and on the nature of this case, the district court reasonably found that Matassarin might be more interested in hurting her ex-husband than in ensuring adequate representation for a class. In addition, the district court rightly found that Matassarin could not serve as both the representative plaintiff and the class attorney; her duty to

represent class interests would impermissibly conflict with her chance to gain financially from an award of attorneys' fees. The Fifth Circuit frowns upon a named plaintiff's partner or spouse serving as counsel for a class. See, e.g., *Phillips v. Joint Legislative Committee on Performance and Expenditure Review, 637 F.2d 1014, 1023 (5th Cir. 1981); Zylstra v. Safeway Stores, Inc., 578 F.2d 102, 104 (5th Cir. 1978).* It follows that the same reasoning should prevent a named plaintiff herself from serving as counsel. See *Zylstra, 578 F.2d at 104* ("We are persuaded . . . that attorneys . . . who themselves are members of the class of plaintiffs should be subject to a per se rule of disqualification under Canon 9 [of the Code of Professional Responsibility] and should not be permitted to serve as counsel for the class."). Finally, even apart from those grounds upon which the district court explicitly relied, several other considerations support the denial of class certification. These include Matassarin's atypical position as a QDRO beneficiary to the ESOP--Matassarin herself spends pages of her reply brief to this Court arguing that she was in fact discriminated against and treated differently than other ESOP participants, including other segregated-account holders--and the likely failure of at least one of her proposed classes to meet Rule 23's numerosity requirement.

Accordingly, the district court's decision to deny class certification did not constitute an abuse of discretion.

III

We affirm the district court's grant of summary judgment for the defendants as to Matassarin's state and federal securities claims.

A. Federal Securities Claims

A cause of action falls under the 1933 Securities Act and the 1934 Securities Exchange Act only if the interest involved constitutes a "security" under § 2(1) of the '33 Act, *15 U.S.C. § 77b*(a)(1), n8 or § 3(a)(10) of the '34 Act, *15 U.S.C. § 78c*(a)(10). n9 Neither Act specifically includes any sort of ERISA-type plan in its definition. The few courts addressing whether such plans are securities have focused on whether the plans constitute "investment contracts" under the Acts. See, e.g., *International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 99 S. Ct. 790, 58 L. Ed. 2d 808 (1979); Uselton v. Commercial Lovelace Motor Freight, 940 F.2d 564 (10th Cir. 1991).* An investment contract has three components: It (1) involves an investment of money (2) in a common enterprise (3) with profits to come solely from the efforts of others. See *SEC v. W.J. Howey Co., 328 U.S. 293, 301, 66 S. Ct. 1100, 1104, 90 L. Ed. 1244 (1946).* Matassarin contends that language in the Great Empire ESOP document--such as "stock" and "security"--establishes that an interest in the ESOP is a security. This argument is without merit. The Howey test "is to be applied in light of 'the substance--the economic realities of the transaction--rather than the names that may have been employed by the parties.'" *Daniel, 439 U.S. at 558, 99 S. Ct. at 796* (quoting *United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 851-52, 95 S. Ct. 2051, 2060, 44 L. Ed. 2d 621 (1975)).* Matassarin also argues that the Tenth Circuit's reasoning in Uselton, the only case since Daniel in which a circuit court discussed at length whether an ESOP constitutes a security, should control in this case. We agree that Uselton's reasoning is persuasive, but we find that the Great Empire ESOP, considered under Daniel and Uselton together, is not subject to '33 or '34 Act protection.

Daniel involved a union-established pension plan to which employers contributed. Every union member had to belong to the plan and could not have the employer contributions paid directly to him instead of to the plan. Every plan participant who served 20 continuous years with the union received identical "defined" pension benefits after retirement. The employers made uniform contributions for each week an employee worked. An employee did not have an individual account tied to employer contributions attributable to his period of service. When the union denied benefits to member John Daniel after he retired, Daniel sued under the '33 and '34 Acts. The Court found that the union pension plan did not constitute an "investment contract" under Howey. First, the Court found that the plan did not include an "investment of money": The plan collected a small part of each employee's compensation package, but the employee did not pay any "tangible and definable consideration in return for an interest." *Daniel, 439 U.S. 551 at 560, 99 S. Ct. at 797.* Furthermore, no fixed relationship existed between employer contributions to the fund and an employee's potential benefit. "Looking at the economic realities," the Court wrote, "it seems clear that an employee is selling his labor primarily to obtain a livelihood, not making an investment." *Id. at 560, 99 S. Ct. at 797.* Second, the Court reiterated that, as it had stated in Forman, "the 'touchstone' of the Howey test 'is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.'" Id.(quoting *Forman, 421 U.S. at 852, 95 S. Ct. at 2060).* Although the union pension fund in Daniel depended some on earnings from its assets, "a far larger portion of its income [came] from employer contributions, a source in no way dependent on the efforts of the [plan's] managers." 439 U.S.at 562, *99 S. Ct. at 797.* An employee's receipt of benefits was not tied to

the financial health of the plan but instead to the employee's meeting eligibility requirements. Therefore, "viewed in light of the total compensation package an employee must receive in order to be eligible for pension benefits, it [became] clear that the possibility of participating in a plan's asset earnings '[was] far too speculative and insubstantial to bring the entire transaction within the Securities Acts.'" *Id. at 563, 99 S. Ct. at 798* (quoting *Forman, 421 U.S. at 856, 95 S. Ct. at 2062).*

Uselton concerned an entirely different type of plan, an ESOP. In 1984, Pepsico, Inc. sold Lee Way Motor Freight ("Lee Way"), a wholly owned subsidiary, to Commercial Lovelace ("CL"). Almost immediately, CL began encouraging Lee Way's union employees to participate in CL's year-old wage-reduction program. The program allowed an employee to take a voluntary 17.35-percent reduction in wages in exchange for profit sharing and an interest in CL's existing ERISA-governed ESOP. The ESOP established individual accounts for participants, allocating shares of CL stock according to the employee's compensation. Within a year, CL merged with Lee Way and filed for bankruptcy. Pepsico thereafter allegedly reacquired Lee Way's former assets. Union employees who had chosen to participate in the wage-reduction program charged that Pepsico's sale of Lee Way and CL's rapid demise were a sham transaction to facilitate and disguise Pepsico's liquidation of Lee Way. They brought suit to recover their contributed wages, relying in part on federal securities laws.

The Tenth Circuit acknowledged that "an employee benefit plan that is either noncontributory or compulsory is not an investment contract because it does not allow a participant to make the 'investment' required by the first prong of the Howey test." *Uselton, 940 F.2d at 573-74.* The court noted,

however, that in the CL ESOP, each union employee who chose to join gave up specific consideration--a portion of his wages--and thus made an investment. See *id. at 575-76.* The court also held that the CL ESOP satisfied the third Howey prong, as it would produce capital-appreciation profits and/or allow participation in earnings resulting from the investment: "Any profit on plaintiffs' ESOP interest would occur through dividend distributions and appreciation in the value of the stock allocated to their accounts, which in both cases would result primarily from the efforts [of] CL's managers and its employees." *Id. at 576-77.*

Under the Tenth Circuit's reasoning, the Great Empire ESOP meets Howey's third prong. Nonetheless, under both Uselton and Daniel, the Great Empire ESOP fails Howey's first prong; it is not a voluntary investment choice, but instead a mandatory, employer-funded program. n10 Matassarin therefore cannot maintain a federal securities action, and the district court's grant of summary judgment is affirmed as to that claim.

B. State Securities Claims

Matassarin also brought claims under Texas Business and Commerce Code Section 27.01 and under Texas Civil Statutes article 581 (Blue Sky Law). The district court dismissed Matassarin's state securities claims, stating, "Texas law uses the same basic standards as federal law for determining what constitutes a security. . . . Because this Court has previously ruled that the transaction in the present case does not satisfy the Howey test for what constitutes a security, the Court concludes that Texas state law would arrive at the same result." The district court cited *Wilson v. Lee, 601 S.W.2d 483, 485* (Tex. Civ. App.--Dallas 1980,

n.w.h.), for the proposition that federal precedent defining a "security" also applies to the definition of a security under Texas state law. But neither Wilson nor other cases that state this proposition n11 deal with an ESOP interest. In fact, Texas law may differ from federal law as to whether an ESOP interest is a security. Texas Civil Statutes article 581 provides, in part:

The term "security" or "securities" shall include . . . any certificate or instrument representing or secured by an interest in any or all of the capital, property, assets, profits or earnings of any company, investment contract, or any other instrument commonly known as a security, whether similar to those herein referenced or not.

Tex. Rev. Civ. Stat. art. 581--4(A). Unlike the federal securities law definitions of a "security" found in *15 U.S.C. § § 77b*(a)(1) and 78c(a)(10), the Texas statute may well be broad enough to include a nonvoluntary ESOP interest. We need not reach the issue, however, because even if the Great Empire ESOP constitutes a security under Texas law, Matassarin cannot maintain her state securities action.

Matassarin bases her action upon Texas Revised Civil Statutes article 581--33(B) and upon Texas Business and Commerce Code § 27.01(a)(1). The former provision states in part:

A person who offers to buy or who buys a security . . . by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, is liable to the person selling the security to him, who may sue either at law or in equity for recision or for damages if the buyer no longer owns the security.

Tex. Rev. Civ. Stat. art. 581--33(B). Texas Business and Commerce Code section 27.01 applies to fraud in stock transactions. That section provides in part:

> Fraud in a transaction involving . . . stock in a corporation or joint stock company consists of a . . . false representation of a past or existing material fact, when the false representation is (A) made to a person for the purpose of inducing that person to enter into a contract; and (B) relied on by that person entering into the contract . . . .

Tex. Bus. & Com. Code § 27.01(a)(1). Requisite to an action under these statutes is an "untrue statement of a material fact or an omission to state a material fact" or a "false representation." Matassarin's state securities claim rests upon an issue central to her ERISA argument, namely, that the defendants made misrepresentations concerning her ESOP rights or the value of her benefit. As set forth hereafter in our discussion of Matassarin's ERISA claims, we find that the defendants made no untrue statements of material fact or false representations to her. On that ground, we affirm the district court's grant of summary judgment on Matassarin's state securities claims. See *Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1146 (5th Cir. 1993)* (noting that an appellate court may affirm a grant of summary judgment on grounds other than those relied on by the district court).

IV

Matassarin seeks recovery under the Employee Retirement Income Security Act of 1974 for benefits due her under the Plan and relief for various ERISA violations. We find that the district court properly granted summary judgment to the defendants on Matassarin's ERISA claims. n12

A. Denial of Benefits Due

Great Empire interpreted the Plan and Matassarin's QDRO to require segregation of Matassarin's Plan benefits into an account that will accrue minimal interest until Danny Jenkins reaches retirement age. Matassarin contends that her benefit due should continue to be 520.086 shares of Great Empire shares at current share value, or alternatively that she, along with other segregated-account holders, should have the opportunity to receive a cash distribution equal to the current fair market value of her shares. ERISA § 502(a)(1)(B) states: "A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . ." *29 U.S.C. § 1132*(a)(1)(B). As a QDRO recipient, Matassarin has standing to bring these claims. See *Boggs v. Boggs, 520 U.S. 833, , 117 S. Ct. 1754, 1763, 138 L. Ed. 2d 45 (1997)* ("In creating the QDRO mechanism Congress was careful to provide that the alternate payee . . . is to be considered a plan beneficiary."); see also *29 U.S.C. § 1056* (d)(3)(J).

The Great Empire ESOP gives its administrator discretionary authority to construe the Plan terms. n13 When a plan gives such discretion, a district court will overrule the plan administrator's interpretation of plan terms only if the interpretation is "arbitrary and capricious." See *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S. Ct. 948, 955, 103 L. Ed. 2d 80 (1989); Wildbur v. ARCO Chemical Co., 974 F.2d 631, 637-39 (5th Cir. 1992).* The "arbitrary and capricious" review amounts to an abuse-of-discretion standard. See *McDonald v. Provident Indemnity Life Insurance. Co., 60 F.3d 234, 236 (5th Cir.*

1995). Applying the same standards as the district court, this Court reviews the Great Empire ESOP administrator's interpretation of Plan terms for abuse of discretion.

We do not afford such deference to the Plan administrator's interpretation of Matassarin's QDRO. A court reviews de novo a plan administrator's legal conclusions regarding the meaning of a contract or statute. Cf. *Penn v. Howe-Baker Engineers, Inc., 898 F.2d 1096, 1100 (5th Cir. 1990)* (reviewing de novo a plan administrator's determination as to whether an employee was an independent contractor for coverage purposes). The QDRO, unlike the Plan, is a separate, judicially approved contract between Jenkins and Matassarin, which the Plan administrator has no special discretion to interpret. Although we allow a plan administrator discretion to determine whether an agreement constitutes a QDRO under the plan, we otherwise review de novo a plan administrator's interpretation of the meaning of a QDRO. See *Hullett v. Towers, Perrin, Forster & Crosby, Inc., 38 F.3d 107, 114 (3d Cir. 1994)* (finding that a district court "did not err in holding that it should review de novo the plan administrator's construction of the [divorce agreement], which invoked issues of contract interpretation under the Agreement and not the plan").

1. The Nature of Matassarin's Interest

Congress created the QDRO structure in the Retirement Equity Act ("REA") of 1984, which amended ERISA. Through the REA, Congress enhanced ERISA's protection of divorced spouses and their interest in retirement funds earned during marriage. See Boggs, 520 U.S. at , 117 S. Ct. at 1763. "The QDRO provisions protect those persons who, often as a result of divorce, might not receive the benefits

they otherwise would have had available during their retirement as a means of income." Id. at , 117 S. Ct. at 1767. In order to accomplish this, the REA amendments require that "each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." *29 U.S.C. § 1056*(d)(3)(A). Furthermore, "each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders." *29 U.S.C. § 1056*(d)(3)(G)(ii).

The QDRO in this case assigned Matassarin one-half of Jenkins's "interest [in] the assets accredited to [his] ESOP Accounts as of October 15, 1991." It also "required that the Administrator of the Great Empire Broadcasting, Inc. ESOP segregate [Matassarin's assigned] Interest, and that said segregated account . . . continue to accumulate Interest at a rate equivalent to a one-year Certificate of Deposit." These two requirements' opaqueness makes it understandable that Matassarin might question the treatment of her account. We seek here to provide clarification.

Matassarin contends that she is entitled to more than the simple interest that will accumulate on her segregated shares' cash value as of the last valuation date before the segregation. She contends that she should receive the cash value of 520.086 shares at whatever time the Plan passes the benefits to her. We disagree. The ESOP defines the "valuation date" as the December 31 "coinciding with or immediately preceding the date of actual distribution of Plan Benefits." Matassarin states that because the Plan has not made a distribution to her, the administrator erred by valuing her shares as of the divorce date. The QDRO, however, contravenes the interpretation that Matassarin urges.

Necessarily reducing Matassarin's interest to cash value is implicit in the QDRO, because cash principal can accumulate interest, whereas shares, owing to their fluctuating value, cannot. To read the QDRO as requiring Matassarin to receive the total of 520.086 shares valued at the date of payment to Matassarin would render meaningless the QDRO provision pertaining to interest. The Plan administrator instead valued Matassarin's interest at the date of segregation--that is, distribution to her interest-accumulating segregated account. In light of the QDRO provisions, the Plan administrator's interpretation was legally correct.

Matassarin also argues that the Great Empire ESOP--specifically, restated § 18(e)(1)--supports her position. Under that provision, the Plan administrator must segregate a QDRO beneficiary's account and "continue to [treat it] in the same manner as the affected Accounts of the Participant," albeit absent further contributions or forfeitures from Great Empire. The appellees argue that the restated Plan, although retroactive to 1989, should not apply to Matassarin's QDRO, because at the time that the QDRO was entered, the original Plan provisions were effective. The appellees' reasoning is not self-evident, and one might plausibly argue that the 1994 restatement should indeed apply to Matassarin's QDRO. n14 That issue, however, is a matter of Plan interpretation, which we review under the abuse-of-discretion standard. No matter which interpretation this Court might prefer, the Plan administrator did not act arbitrarily and capriciously in finding that the provisions added to § 18(e)(1) in 1994 do not govern Matassarin's QDRO.

2. Distribution of Benefits

Matassarin argues that she is currently entitled to distribution of her benefit, that beneficiaries under the ESOP may select distribution of benefits "in the form of employer securities," and that beneficiaries have an option to "put" those securities back for fair market value. Matassarin argues that two tax code provisions-- *26 U.S.C. § 409*(h) n15 and *26 U.S.C. § 4975*(e)(7) n16--mandate these beneficiary options in a tax-exempt plan such as the Great Empire ESOP. Matassarin is correct that, under those provisions, ESOP participants who are entitled to distribution must be able to demand employer securities as the form of distribution. She is, however, mistaken to contend that she is now entitled to a distribution. Although the QDRO fails to specify the date of distribution, § 18(e)(4) in both the original and the restated Plan provides that no distributions need be made to Matassarin before Jenkins reaches retirement eligibility. The Retirement Equity Act recognizes that a QDRO may delay distribution until the Plan participant could retire. See *29 U.S.C. § 1056*(d)(3)(E)(i). We see no reason why an ERISA-qualified plan may not do the same.

Matassarin's domestic relations order met the Plan's § 18(e) qualifications. The Plan administrator interpreted the QDRO requirements and harmonized them with the Plan provisions. We find no error in the Plan administrator's interpretation of the QDRO and no abuse of discretion in its interpretation of the Plan provisions. Accordingly, we affirm the district court's grant of summary judgment to the defendants on Matassarin's ERISA claim for denial of benefits.

B. ERISA Violations and Breach of Fiduciary Duty

Matassarin next contends that the Great Empire ESOP fiduciaries failed to satisfy ERISA requirements and violated

their fiduciary duty to her and to the Plan generally. She relies upon ERISA § § 502(a)(2) and (a)(3).

1. Section 502(a)(2)

Section 502(a)(2) provides a cause of action for injuries caused by violations of ERISA § 509. Section 509 focuses on fiduciary breaches that cause harm to a plan as a whole:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a). The Supreme Court, noting ERISA's primary concern with the possible misuse or poor management of plan assets, has stated that the "loss to the plan" language in § 1109 limits claims to those that inure to the benefit of the plan as a whole and not to the benefit only of individual plan beneficiaries. See *McDonald, 60 F.3d at 237* (citing *Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 140-42, 87 L. Ed. 2d 96, 105 S. Ct. 3085, 3089-90 & nn. 8-9 (1985)).* Based upon this statutory purpose, we find that the district court properly granted summary judgment on Matassarin's § 502(a)(2) claim.

Most of the ERISA breaches that Matassarin alleges concern only her individual account or, at most, those of the sixty-seven Plan participants who were offered lump-sum distributions. The exception to this is Matassarin's claim that the defendants failed to conform the Great Empire ESOP to *26 U.S.C. § 409*(h) and *26 U.S.C. § 4975*(e)(7) and thereby

jeopardized the Plan's tax-exempt status. It appears that the original Plan document did fail to allow segregated-account holders to purchase company stock. The amended Plan document remedied that error in order to bring the Plan into compliance with the tax code provisions. The defendants have admitted to omitting mistakenly from the May 1995 follow-up correspondence the fact that participants could select Great Empire securities as the form of distribution. But this omission seems to have been a simple oversight. Nothing in the record or pleadings indicates that participants who were entitled to distribution were in fact denied the right to demand employer securities, such as would disqualify the Plan under those tax code provisions. Matassarin has failed to allege any way in which the defendants' actions caused a loss to the Plan as a whole as envisioned in § 502(a)(2). We therefore affirm the district court's grant of summary judgment on Matassarin's § 502(a)(2) claim.

2. Section 502(a)(3)

Summary judgment on Matassarin's § 502(a)(3) claim was appropriate only if Matassarin provided no evidence of any ERISA violation. Under § 502(a)(3), a plan participant may bring an action

(A) to enjoin any act or practice which violates any provision of [ERISA's protection of employee benefit rights] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA's protection of employee benefit rights] or the terms of the plan.

29 U.S.C. § 1132(a)(3). A plan beneficiary may bring a § 502(a)(3) action

against an ERISA fiduciary based on loss to the individual beneficiary as well as based on loss to the plan as a whole. See *Varity Corp. v. Howe, 516 U.S. 489, 496, 116 S. Ct. 1065, 1075-76, 134 L. Ed. 2d 130 (1996)* (contrasting § 1132(a)(2) with § 1132(a)(3), which does not require loss to the plan as a whole). Matassarin alleges four types of ERISA violations: (1) fiduciary self-dealing, (2) failure to invest prudently, (3) interference with her exercise of protected rights, and (4) failure to provide information.

a. Fiduciary Self-Dealing

The Great Empire ESOP in early 1995 reabsorbed suspended shares in § 14(h) accounts, paying each account holder the value of his shares as of the December 31 preceding his separation from the Plan. According to Matassarin, the Plan effectively repurchased shares for less than the fair market value on the date of repurchase. Those who benefitted most from this repurchase, she continues, were (1) the Plan fiduciaries, who held the largest share accounts in the Plan; and (2) Lynch and Oatman, whose company, Great Empire, was able to avoid paying fair market value for the shares. Matassarin argues that these actions violated ERISA § 406(b), which prohibits fiduciary self-dealing. n17

We need not consider the claim in depth. Under § 502(a)(3), a beneficiary may bring an action to enjoin an ERISA violation or for equitable relief. In this case, Matassarin has nothing to enjoin and no equitable relief available to her on behalf of the Plan as a whole. The "repurchase" took place in 1995. The Plan as a whole did not suffer, and Matassarin's individual segregated account was unaffected. Even if Matassarin's § 406(b) allegations are meritorious, the only beneficiaries possibly entitled to relief would be the Plan

participants who were allegedly offered less than fair value for the interests in their § 14(h) accounts. n18 As we have stated, the district court did not abuse its discretion in finding Matassarin an inappropriate representative for a class that would include those Plan participants. Whereas Matassarin individually has no § 502(a)(3) relief available to her for § 406(b) violations, the district court properly denied her claim for breach of fiduciary duty. n19

b. Failure To Invest Prudently

Matassarin next argues that the defendants' allowing her segregated account to accrue only minimal interest violates the prudent-person investment standard's diversification requirement under ERISA § 404. ERISA § 404 requires a plan fiduciary to "discharge his duty with respect to a Plan solely in the interest of the participants and beneficiaries and . . . by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." *29 U.S.C. § 1104*(a)(1)(C); see *Metzler v. Graham, 112 F.3d 207, 209 (5th Cir. 1997)* (addressing the diversification requirement). The defendants' failure to diversify Matassarin's account did not in any way expose it to the risk of large losses and therefore did not breach an explicit § 404 diversification duty. We are mindful, however, that implicit within § 404(a) is the desirability of increasing a plan's value--preferably ensuring more than passbook interest--through sound investment. n20 Nonetheless, Matassarin's QDRO, the terms of which the defendants were bound to apply, requires just passbook interest, rendering it clearly prudent under § 404(a)(1)(C) for Great Empire not to diversify in this case.

We recognize the aberrancy and difficulty of Matassarin's situation. In enacting ERISA, Congress sought to ensure that workers who have been promised certain retirement benefits actually receive those benefits. See *Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 720, 104 S. Ct. 2709, 2713, 81 L. Ed. 2d 601 (1984).* Although the primary purpose of an ESOP differs from that of a pension plan, ESOPs remain subject to ERISA's general protective restrictions and requirements. See *Cunningham, 716 F.2d at 1463-68.* From Matassarin's point of view, the QDRO structure has hurt her retirement prospects. While married to Jenkins, Matassarin no doubt looked forward to enjoying with him the retirement benefits of his Great Empire ESOP shares. Presumably, she and Jenkins expected that the shares' value would increase in the years before Jenkins became eligible for retirement. Because the QDRO requires valuation of Matassarin's shares as of the date of her divorce, she lost the prospect of significant increase in the shares' value to fund her retirement. In short, Matassarin's QDRO removed her savings from the ambit of a more traditional ERISA-qualified ESOP or pension plan, which would focus on increasing savings.

This case raises the question, then, of how a plan administrator is to treat a beneficiary whose QDRO appears out of line from the greater goals of ERISA. We believe that both ERISA and case law require a plan administrator to follow the dictates of the QDRO. Once a plan administrator determines that a domestic relations order meets the criteria set forth in *29 U.S.C. § 1056*(d)(3) and thus is "qualified," he is required to act in accordance with the QDRO. See, e.g., *In re Gendreau, 122 F.3d 815, 817-18 (9th Cir. 1997); Metropolitan Life Insurance Co. v. Wheaton, 42 F.3d 1080, 1085 (7th Cir. 1994).* "ERISA does not require, or even permit, a pension fund to look beneath the surface of the

order. Compliance with a QDRO is obligatory. . . . This directive would be empty if pension plans could add to the statutory list of requirements for 'qualified' status." *Blue v. UAL Corp., 160 F.3d 383, 385 (7th Cir. 1998).* Through its QDRO amendments, federal ERISA law defers to domestic relations orders approved in state court proceedings. We do not find the deference to be affected by whether the QDRO may slow the growth of the subject retirement savings.

Matassarin makes several arguments as to why her QDRO should not be enforced. She contends, for example, that Jenkins insisted on the QDRO format as necessary to recognition under the Great Empire ESOP, that Menke & Associates unfairly drafted the order, and that she did not realize the implications of the order for her retirement benefits. A United States district court is not the proper forum in which to raise such arguments. We acknowledge that ERISA supersedes state law insofar as the state law "relates to" an ERISA-qualified employee benefit plan. *29 U.S.C. § 1144*(a). Federal courts may be called upon to determine the proper beneficiary under a QDRO or to review a plan administrator's interpretation of a QDRO, as we have done here. But although we read § 1144(a)'s "relates to" language broadly, see *Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97, 103 S. Ct. 2890, 2900, 77 L. Ed. 2d 490 (1983),* we cannot say that a federal court's role extends as far as examining the circumstances under which a potential beneficiary entered and a state court approved a QDRO. Such a claim affects domestic relations, which is not an area of exclusive federal concern. See *Memorial Hospital System v. Northbrook Life Insurance Co., 904 F.2d 236, 245 (5th Cir. 1990)*(stating that cases in which ERISA preempts state-law claims, the claims address areas of exclusive federal concern). If Matassarin believes that she mistakenly entered

the QDRO or was fraudulently induced to do so, then the Kansas state court that approved that order is the entity to hear her complaints. Cf. *Perkins v. Time Insurance Co., 898 F.2d 470, 473 (5th Cir. 1990)* (holding that a claim that an insurance agent fraudulently induced an insured to surrender his current insurance and participate in an ERISA plan "related to" the ERISA plan only indirectly, so that ERISA would not preempt the state claim). The REA amendments preserve ERISA anti-alienation provisions while leaving domestic relations in the states' hands. We will not disturb that structure.

c. Interference with Protected Rights

ERISA § 510, titled "Interference with Protected Rights," makes it unlawful to discriminate against an ERISA plan beneficiary for exercising his rights or in order to interfere with his attainment of any right. See *29 U.S.C. § 1140.* A violation of § 510 requires specific intent to discriminate. See *Unida v. Levi Strauss & Co., 986 F.2d 970, 979-80 (5th Cir. 1993).* Matassarin alleges that Lynch, Oatman, Jenkins, and Great Empire discriminated against her for seeking her entitlement under her QDRO. Although her claims are not entirely clear, Matassarin apparently argues that because Great Empire sent her the May 1995 letters--which it claims were sent in error--and later denied that she was entitled to any distribution, Great Empire was in fact discriminating against her for seeking what she was due. We find that summary judgment on this claim was appropriate because Matassarin produced no evidence that her inquiries prompted the defendants' actions or Plan interpretation. Matassarin also claims more general discrimination based on the appellees' contention that she was the only segregated account holder who was not entitled to a distribution in May 1995. This

claim is likewise without merit. Unlike the sixty-seven separated Plan participants, Matassarin had a QDRO, a separate contract that required different treatment for Matassarin than for the sixty-seven holders of § 14(h) accounts offered distributions. Summary judgment was appropriate as to Matassarin's claims for interference with her protected rights.

d. Failure To Provide Information

Matassarin argues that the defendants violated ERISA § 105(a), *29 U.S.C. § 1025*(a), which concerns statements furnished by an administrator to participants and beneficiaries:

> Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information--(1) the total benefits accrued, and (2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

29 U.S.C. § 1025(a). As the provision states, the plan participant must request the statement in writing in order to trigger the administrator's § 1025 duty. Matassarin seeks penalties of $ 100 per day under ERISA § 502(c)(1) against the trustees and other fiduciary defendants for Great Empire's alleged failure to provide information regarding the value of her stock. Section 502(c)(1), similar to § 1025(a), requires the participant to request information before an administrator may be sanctioned for failing to provide it. n21 Matassarin does not state what, if any, material she specifically requested and the defendants failed to provide, such as would allow for penalties under § 502(c)(1). This Court reviews only for abuse of discretion a district court's decision whether to

to assess penalties under § 502(c)(1). See, e.g., *Godwin v. Sun Life Assurance Co., 980 F.2d 323, 327 (5th Cir. 1992)* (reviewing only for abuse of discretion the district court's refusal to award penalties under § 502); *Fisher v. Metropolitan Life Insurance Co., 895 F.2d 1073, 1077 (5th Cir. 1990)* (same). Given that the defendants do not appear to have denied any request that Matassarin made, the district court did not abuse its discretion in refusing to asses penalties.

In her Third Amended Complaint and other pleadings, Matassarin argued that the defendants violated ERISA when they failed to provide her with a summary plan description or with annual reports. She also provided the district court with an affidavit stating that she had not received a summary plan description. We need not examine whether the district court improperly granted summary judgment on this issue, n22 insofar as Matassarin fails to brief adequately or otherwise pursue it on appeal and thus has waived it.

Accordingly, we affirm the grant of summary judgment as to Matassarin's ERISA § 502(a)(3) claim.

C. Jury Trial Demand

Because we have concluded that Matassarin did not present any viable ERISA claim, we do not consider the district court's denial of her motion for a jury trial.

D. Attorneys' Fees

ERISA § 502(g)(1), *29 U.S.C. § 1132*(g)(1), allows the court, in its discretion, to award reasonable attorneys' fees to either party. Given that Matassarin herself performed most of the legal work and pursued unviable claims, the district court did not abuse its discretion in refusing to award attorneys' fees to Matassarin.

V

Matassarin next appeals Judge Prado's refusal to recuse himself. In her earlier petition to this Court for a mandamus directing the judge to recuse himself, Matassarin complained that a footnote in one of the judge's orders evinced a bias against her. She stated that the footnote, which reminded all parties to the action to treat court personnel with courtesy and civility, resulted from a briefing attorney incorrectly reporting to Judge Prado the tenor of a conversation he had with Matassarin. On the basis of this alleged bias, Matassarin claims, Judge Prado should have recused himself. See *28 U.S.C. § § 144* and 455(a)-(b).

We review Judge Prado's denial of the motion to recuse for abuse of discretion. See *In re Billedeaux, 972 F.2d 104, 106 (5th Cir. 1992)* (citing *Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1166 (5th Cir. 1982))*. "The standard for judicial disqualification under *28 U.S.C. § 455* is whether a reasonable person, with full knowledge of all the circumstances, would harbor doubts about the judge's impartiality." *Vieux Carre Property Owners, Residents, and Associates, Inc. v. Brown, 948 F.2d 1436, 1448 (5th Cir. 1991)*. We note that remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. . . . Not establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration--even a stern and short-tempered judge's ordinary efforts at courtroom administration--remain immune.

Liteky v. United States, 510 U.S. 540, 555-56, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994); see also *Hollywood Fantasy Corp. v. Gabor, 151 F.3d 203, 216 n.6 (5th Cir. 1998)*. Judge Prado's footnote, even if it did result from a false report about Matassarin's interaction with court personnel, falls far, far short of "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky, 510 U.S. at 555, 114 S. Ct. at 1157*. We therefore hold that the district court did not abuse its discretion in denying the motion to recuse.

VI

The judgment of the district court is AFFIRMED in all respects.

----------Footnotes----------

n1 Paragraphs 4 and 5 of Matassarin and Jenkins's QDRO state:

4. The Husband assigns to the Wife as Alternate Payee one-half of his interest of the assets accredited to Participant's ESOP Accounts as of October 15, 1991. This assignment of benefits will require that the Administrator of the Great Empire Broadcasting, Inc. ESOP segregate the Alternate Payee's interest, and that said segregated account will continue to accumulate interest at a rate equivalent to a one-year Certificate of Deposit.

5. This assignment of benefits does not require that the Plan provide any type or form of benefit, or any option, not otherwise provided under the Plan . . . .

Paragraph 5 reflects the language of *29 U.S.C. § 1056*(d)(3)(D).

n2 Section 14(h) of the original Plan provided, in part, that a Plan participant's segregated account would earn interest equivalent to that paid on a one-year certificate of deposit ("CD"):

> Any part of a Participant's Plan Benefit which is retained in the Trust after the Anniversary Date coinciding with or immediately following the date on which he terminates employment will be credited to a separate account in the name of the Participant, and such account shall be credited with interest on the unpaid principal balance at the rate paid on one-year certificates of deposit (as of the beginning of each Plan Year) by any bank or savings and loan association designated, in its sole discretion, by the Committee. . . . The balance in a Participant's undistributed account shall represent his interest in the Company Stock Account and the Other Investments Account. However, except in the case of reemployment (as provided for in Section 4), none of his Accounts will be credited with any further Employer Contributions or Forfeitures.

Section 14(g) of the amended Plan provides essentially similar language.

n3 The administrative committee oversees the trustees' actions. Lynch and Oatman, along with appellees Karen Warner, Don Burford, and Curtis Brown, comprise the committee.

n4 It appears from the record that all segregated-account holders who failed to respond to the December received such follow-up correspondence.

n5 The law firm of Brin & Brin, P.C., where Matassarin worked as an attorney, originally represented Matassarin in this matter. Matassarin signed many of the Brin & Brin pleadings herself. At some time during these proceedings, Matassarin's employment with Brin & Brin ended and Brin & Brin ceased representing her. Matassarin, unable to find counsel who would take the case on a contingent-fee basis, began to handle the case alone.

n6 Matassarin raises the following issue on appeal: "The District Court erred in finding that Matassarin was not a 'suitable' representative for Class Action and/or Joinder and/or a Shareholder's Derivative Action and in denying Motions pertaining to each." Within her brief, however, Matassarin addresses only the issue of class certification. We therefore deem the issues of joinder and shareholder's derivative abandoned on appeal by Matassarin and do not consider them further.

n7 Federal Rule of Civil Procedure 23 lists four prerequisites to a class action:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(A).

n8 Section 77b(a)(1) provides:

The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

n9 Section 78c(a)(10)'s definition of "security" is similar to that of § 77b(a)(1).

n10 Matassarin seeks to defeat this point by arguing that "an individual may use cash to purchase shares of stock." This argument misrepresents the Plan provision she cites, § 17(b), which provides only that a participant may leave a portion of his distributions, if any, in the Plan for reinvestment. This is not equivalent to using cash from any source to buy stock.

n11 See, e.g., *Callejo v. Bancomer, 764 F.2d 1101, 1125 n.33 (5th Cir. 1985); Campbell v. C.D. Payne & Geldermann Sec., Inc., 894 S.W.2d 411, 417* (Tex. App.--Amarillo 1995, writ denied); *First Municipal Leasing Corp. v.*

Blankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d 410, 414 (Tex. App.--Dallas 1983, writ ref'd n.r.e.).

n12 Because we affirm the grants of summary judgment, we do not consider whether appellee Menke & Associates could face liability as a Plan fiduciary within *29 U.S.C. § 1002*(21)(A)'s definition of a fiduciary.

n13 Plan § 18(a)(2)(A), in both the original and the amended version, provides, in part, "All decisions required to be made by the [Plan administrative] Committee involving the interpretation, application and administration of the Plan shall be resolved by majority vote either at a meeting or in writing without a meeting."

n14 In the original Plan § 19(a), Great Empire "reserved the right to amend the Plan at any time and from time to time, in whole or in part, including without limitation, retroactive amendments . . . ." Matassarin became a Plan beneficiary on October 15, 1991, and remained so in 1994, when the Plan was restated. Section 1(b) of the 1994 restatement rendered the restatement's provisions retroactive to January 1, 1989. The restatement does not except segregated accounts from retroactive application of its terms. Thus, at the time that Plan fiduciaries offered Matassarin a distribution in December 1994 or May 1995, they might have been able to treat Matassarin's account--a "segregated account" as established under the Plan--as subject to the restated Plan.

n15 That statute provides, in part:

A plan meets the requirements of this subsection if a participant who is entitled to a distribution from the plan--(A) has a right to demand that his benefits be

distributed in the form of employer securities, and (B) if the employer securities are not readily tradable on an established market, has a right to require that the employer repurchase employer securities under a fair valuation formula.

26 U.S.C. § 409(h)(1).

n16 "A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of section 409(h) . . . ." *26 U.S.C. § 4975*(e)(7).

n17 A fiduciary with respect to a plan shall not--

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

29 U.S.C. § 1106(b).

n18 We make no finding here as to whether any separated Plan participant with a § 14(h) account would have a claim against the Plan fiduciaries.

n19 We have not considered whether the duties set forth in § 406(b) necessarily apply in this ESOP situation. ERISA § 408(e) generally exempts ESOP fiduciaries from § 406 requirements when the questioned transaction involves the acquisition or sale of "qualifying employer securities,"

which include stock. *29 U.S.C. § 1108*(e); see *29 U.S.C. § 1107*(d)(5)(A). Section 408(e) has been interpreted to allow "an ESOP [to] acquire employer securities in circumstances that would otherwise violate Section 406 if the purchase is made for 'adequate consideration.'" *Donovan v. Cunningham, 716 F.2d 1455, 1465 (5th Cir. 1983)*. The more likely challenge involving this exemption would question whether an ESOP paid too much for employer securities. We know of none in which a claimant alleged that an ESOP cheated its former participants by paying too little for employer securities. Whereas Matassarin would not be entitled to relief even if § 406(b) does apply, we need not decide the issue here.

n20 Section 404(a)(1)(B), for example, requires an ERISA fiduciary to discharge his duties as would "a prudent man acting in like capacity and familiar with such matters," which would contemplate increasing the plan's value. *29 U.S.C. § 1104*(a)(1)(B).

ERISA sound-investment requirements do not generally apply to an ESOP, which is "designed to invest primarily in securities issued by its sponsoring company." *Cunningham, 716 F.2d at 1458;* see *29 U.S.C. § 1104*(a)(2) (exempting ESOPs from diversification requirements); *29 U.S.C. § 1107*(b), (d) (same); see also *Moench v. Robertson, 62 F.3d 553, 568 (3d Cir. 1995)* ("ESOPs, unlike pension plans, are not intended to guarantee retirement benefits, and indeed, by its very nature, 'an ESOP places employee retirement assets at much greater risk than does the typical diversified ERISA plan.'" (quoting *Martin v. Feilen, 965 F.2d 660, 664 (8th Cir. 1992)*). If Matassarin were an ordinary ESOP participant, the nature of the Plan would probably exempt

her account from standard ERISA diversification requirements. But Matassarin is of course not an ordinary ESOP participant, insofar as her account, per the terms of her QDRO, no longer depends upon employer securities. As such, any ESOP exception seems inapplicable.

n21 ERISA § 502(c)(1) states, in part:

Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1).

n22 ERISA § 104(b), *29 U.S.C. § 1024*(b), requires that plan participants and beneficiaries be furnished with a summary plan description, as set forth in § 1022(a), and with annual reports.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Patricia Matassarin,
Plaintiff

v.

F.F. Mike Lynch, et. al.,
Defendants.

Civil Action No. SA-97-CVF-0482

Dated 11-10-97

ORDER GRANTING SUMMARY JUDGEMENT

On this date came to be considered the Plaintiff's Motion for Additional Time Within Which to Complete Discovery, received October 14, 1997 in the above-styled and numbered cause, and the Great Empire Defendants' Response, filed October 24, 1997.[1] Also considered were the Plaintiff's Motion to Extend Time Within Which to Respond to Defendants Menke and Associates, Inc.'s Motion for Summary Judgment, filed October 21, 1997, and Defendant Menke and Associates, Inc's Response, filed October 31, 1997. Also considered were the Great Empire Defendants' Motion for Summary Judgment[2], filed October 2, 1997, the Plaintiff's Response, received[3] October 14, 1997 (hereinafter "Response"), the Defendants' Reply, filed October 24, 1997, and the Plaintiff's Alternate Second Response, filed November 7, 1997. Also considered were the Plaintiff's Contingent Motiion for Reinstatement or Amendment or

Realignment, received October 14, 1997.[4] After careful consideration, the Court will deny the Plaintiff's Motion for Additional Time, will grant the defendants' Motion for Judgment, will deny the Plaintiff's Contingent motion.

I. Facts and Procedural Posture

This case concerns a divorce and an ERISA plan. After several years of marriage, Plaintiff Patricia Matassarin and Defendant Danny Jenkins divorced. At the time of divorce, Defendant Jenkins, by virtue of his employment, participated in an employee retirement program called the Great Empire Broadcasting's Employee Stock Ownership Plan ("ESOP", "Plan", or "Original Plan"). His account with this program was not easily divided at the time of divorce, and therefore, in June of 1992, the Eighteenth Judicial District Court, Sedgewick County, Kansas, Domestic Department, entered a Qualified Domestic Relations Order ("Q.D.R.O") telling the ESOP how to allocate the Jenkins account. See Attachment A to Great Empire Defendants' Supplemental Response to Plaintiff's Motion to Certify Class Action, filed September 27, 1996 (Docket No. 57). The Q.D.R.O. ordered the ESOP to segregate the Plaintiff's portion of her husband's account and to pay interest equal to a one-year certificate of deposit on that segregated portiion for so long as the ESOP managed the Plaintiff's funds. Id. at paragraph 4. The Plaintiff and Defendant Jenkins approved the Q.D.R.O. and, so far as the record currently reflects, it appears that the ESOP complied with the Q.D.R.O. in all respects.

In 1994, the ESOP underwent a major overhaul, and certain modifications were added to the Original Plan. This new ERISA plan ("Modified Plan") was properly approved of by the trustees and administrators of the ESOP ("the Plan Trustees" or "Plan Fiduciaries" or Defendants"). This modification of the ESOP does not appear to have worked

any great changes on the way previously-segregated Q.D.R.O. accounts were handled.

Between entry of the June 1992 Q.D.R.O. and May of 1995, the value of Great Empire's stock rose from $22.00 to approximately $50.00 per share. For most members of the ESOP, the rise in stock price meant an equivalent rise in the value of their accounts. However, the Plaintiff's account, apparently because of the Q.D.R.O., increased in value only at the interest rate prevailing for one-year certficates of deposit. In effect, while other accounts in the ESOP doubled in value over a three-year period, the Plaintiff's account only increased by a small amount.

In May of 1995, the Plaintiff received two letters from the ESOP administrators offering her a disbursement from her account. This offer -- which was sent to the Plaintiff in error -- revealed to the Plaintiff that her account had received only a small amount of interest, and not the benefits expected with a doubling of a stock price. The letters also failed to inform the Plaintiff that she had a right to a disbursement in the form of stock. The Plaintiff sent several queries to the Defendants, asking for information regarding her account. The Defendants replied to these letters, but these responses were unsatisfactory to the Plaintiff. Therefore, the Plaintiff -- an expert on ERISA -- brought the present lawsuit.[5]

The Plaintiff originally asserted her claims both individually and as a representative of those beneficiaries similarly situated, and, at the outset, sued for relief under ERISA, federal securities laws, state securities laws, and the common law. The Court, after finding that the Plaintiff class action status. The Court also found that the ESOP was not a

security, and dismissed the federal and state securities law claims, as well as the common law causes-of-action.

As the suit stands now, the Plaintiff complains that here account was misvalued, that her account was wrongly segregated, that the distribution letters the Plaintiff received did not inform her (or other Plan participants) of her right to receive stock instead of cash, that because the Defendants failed to advise here of her right to receive stock instead of cash (and because of the way the Plan trustees treat Q.D.R.O. beneficiaries) the ESOP is in danger of losing its privileged tax status, and that the Plan Administrator did not properly respond to her information requests or send her required information.

II. Analysis

The Plaintiff in the present case has brought foour overlappling causes of action -- a claim for relief under 29 U.S.C. Sec. 1132(a)(1)(B) for misvaluation, a claim for relief under 29 U.S.C. Sec. 1132(a)(2) for breach of fiduciary duty, a claim for relief under 29 U.S.C. Sec. 1132(a)(3) for equity, and a claim for relief under 29 U.S.C. Sec. 1140 for discrimination. The Plaintiff also requests that the Court abate the current proceedings so that more discovery may be undertaken, and requests that this Court grant her leave to amend. The Defendants have moved for summary judgment.

III. Summary Judgment Standards

Motions for summary judgment are authorized by Rule 56 of the Federal Rules of Civil Procedure. These motions permit the Court to resolve lawsuits without the necessity of trials if there is no genuine dispute as to any facts which are material and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(e); Fields v. City of South Houston, Texas, 922 F.2d 1183, 1187 (5th

Cir. 1991); Lavespere v. Niagra Machine & Tool Works, Inc., 910 F.2d 167, 177-78 (5th Cir. 1990), rehearing denied, 920 F.2d 259 (5th Cir. 1090); and Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 79 (5th Cir. 1987).

Rule 56(e) of the Federal Rules of Civil Procedure provides in part:

> When a motion for summary judgment is made and supported as provded in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Fed.R.Civ.P. 56(e). Thus, a court may grant a motion for summary judgment if the opposing party fails to present controverting evidence.

In the usual case, the party who seeks summary judgment must show by affidavit or other evidentiary materials that there is no genuine dispute as to any fact material to resolution of the motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.4, 106 S.Ct. 2505, 2511 n. 2, 91 L.Ed.2d 265 (1986); Fields v. City of South Houston, Texas, 922 F.2d 1183, 1187 (5th Cir. 1991); Lavespere v. Niagra Machine & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990); Isquith v. Middle South Utilities, Inc., 847 F.2d 186, 198 (5th Cir. 1988); and Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986). In order for the Court to find there are no genuine material factual issues, the Court must be satisfied that no reasonable

trier of fact could have found for the nonmoving party or, in other words, that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict for the nonmovant. See Anderson v. Libery Lobby, Inc., 477 U.S. at 249-50, 106 S.Ct. at 2510-11; Matsushita Electrical Industrial Co., Ltd. v. Zentih Radio Corporation, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); Lavespere v. Niagra Machine & Tool Works, Inc., 910 F.2d at 178; Bache v. American Telephone & Telegraph Co., 840 F.2d 283, 287 (5th Cir. 1988); and Williams v. Adams, 836 F.2d 958, 961 (5th Cir. 1988). To satisfy this burden,the movant must either submit evidentiary documents that negate the existence of some material element of the nonmoving party's claim or defense or, if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmoving party's claim or defense. See Celotex Corp. v. Catrett, 477 U.S. at 325, 106 S.Ct. at 2552; Lavespere v. Niagra Machine & Tool Works, Inc., 910 F.2d at 178; Isquith v. Middle South Utilities, Inc., 847 F.2d at 198-99; and Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986).

Once the moving party has carried that burden, the burden shifts to the nonmoving party to show that summary judgment is not appropriate. See Fields v. City of South Houston, Texas, 922 F.2d at 1187; Lavespere v. Niagra Machine & Tool Works, Inc., 910 F.2d at 178; and Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 79 (5th Cir. 1987). The nonmoving party cannot discharge this burden by referring to the mere allegations or denials of the nonmoving party's pleadings; rather that party must, either by submitting opposing evidentiary documents or by referring to evidentiary documents already in the record, set

out specific facts showing that a genuine issue exists. See Celotex Corp. v. Catrett, 477 U.S. at 324, 106 S.Ct. at 2553; Fields v. City of South Houston, Texas, 922 F.2d at 1187; Lavespere v. Niagra Machine & Tool Works, Inc., 910 F.2d at 178; Isquith v. Middle South Utilities, Inc., 847 F.2d at 198-99; and Fed.R.Civ.P. 56(e).

Where the party opposing the motion for summary judgment will have the burden of proof on an essential element of his case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element,summary judgment may be entered against him. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986), Fontenot v.Upjohn Co., 780 F.2d at 1194-95.

IV. Motion to Abate

Under the Federal Rules of Civil Procedure, if it appears that a party opposing a summary judgment motion cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may order an abatement so that more discovery may be undertaken. See Fed.R.Civ.P. 56(f). A party seeking discovery to oppose a motion for summary judgment must file an affidavit explaining what information is sought and how this discovery is expected to create a genuine issue of material fact. Hudson River Sloop Clearwater, Inc. v. Department of Navy, 891 F.2d 414, 421 (2nd Cir. 1989).

In the present case, the Plaintiff asks for additional time to discover the following facts:

1. The consequences of a hypothetical disqualification of the Plan's tax-exempt status;
2. The cost of the current litigation;

3. The manner in which accounts become "Segregated Investment Accounts";
4. The segregated status of 69 Plan Participants;
5. The number of persons not advised of their option to receive a distribution in the form of stock;
6. The valuation of the accounts of 69 Plan Participants;
7. The Defendants' opinions whether they may allow or disallow distributions to advance their individual interests; and,
8. The treatment of other Plan Participants.

Response at 4, 6, 10, 12, 13, 14, 18, 22, 23 and 24. After careful consideration, the Court will deny the request for additional time. The Plaintiff has not explained how the thscovery of these matters will lead to the creation of genuine issues of material fact.fn6 Hudson River Sloop Clearwater. Inc. v., Department of Navy, 89]. F.2d at 421. Therefore, the Court will not grant the Plaintiff additional time for discovery under Federal Rule Civil Procedure 56(f).

V. Claims for Relief under 29 U.S.C. Sec. 1132(a) (i)

The Plaintiff has sued under 29 U.S.C. Sec. 1132(a) (1) (B) to recover benefits, enforce rights, and clarify the terms of the Plan. In essence, the Plaintiff claims that the Defendants have, either alone or acting in concert, caused her account to be misvalued, thereby denying her benefits. Response at 9—15.

An ERISA plan administrator's denial of benefits is judicially reviewed under a de nova standard unless the plan gives the administrator discretionary authority to construe the plan, in Which case the court uses an 'arbitrary and capricious' standard.

Wildbur v. ARCO Chemical Co., 974 F.2d 631, 637—39 (5th Cir. 1992) . In a de novo, review, a court looks to whether the plan administrator gave the plan a legally correct interpretation, considering such factors as whether the administrator gave the plan a uniform construction, whether the interpretation is a fair reading of the plan, and unanticipated costs. See Id..; Cathev v. Dow Chemical Co. Medical Care Proa., 907 F.2d 554, 558 (5th dr. 1990). In an 'arbitrary and capricious' review, if the plan interpretation is not legally correct, the Court looks additionally at the internal consistency of the plan relevant regulations, and the indications of good faith. Wildbur 974 F2d at 673-39. In the present case, it appears that the Court should use an 'arbitrary and capricious' standard, as the Plan vests significant discretionary authority in its Plan Administrator. Id.; Defendants' Motion for Summary Judgment, Ex. A - B (Section 18).

Using this standard of review, the Court finds, as an initial matter, that the Plan Administrator correctly interpreted the Plan. The Plaintiff complains that the Plan Administrator wrongly segregated her Q.D.R.O.—created account at the time of its creation, placing the cash value of her interest in her husband's stock account into the equivalent of a certificate of deposit. By doing so, the Plan Administrator denied the Plaintiff the benefits of a rise in stock price. However, under the terms of the Original Plan, it was expressly stated that the Plan Administrator would, pursuant to a Q.D.R.Q., create segregated accounts that were to be governed by Section 14(h) of that Plan. See Defendants' Motion for Summary Judgment, Ex. A. Section 14(h) provides that, in the case of a terminated employee, the value of his account will be credited to a separate account, and such an account will receive interest certificate—of—deposit rates. Id. The Modified Plan contains similar provisions. £n

Ex. B., Defendants' Motion for Summary Judgment, Sec. 14, 18. Thus, the Plan Administrator gave the Plan a uniform and fair construction, and did exactly what the Plan said to do, Wildbur, 974 F.2d at 637—39.

The Court further finds that even if the Plan Administrator gave the Plan an incorrect interpretation, the court would still find that the Administrator did not act in an arbitrary and capricious manner. The Administrator's interpretation of the Plan is internally consistent, it does not scent to violate any regulations, and the Plaintiff has offered this Court no credible evidence of a bad—faith interpretation of the rules regarding Q.D.R.O. beneficiaries, nor any affidavit suggesting further discovery is necessary on this matter. Id.

Finally, it is important to consider the express terms of the Q.D.R.O., which the Plaintiff herself agreed to:

> The Husband (Danny Jenkins] assigns to the Wife (The Plaintiff] as Alternate Payee one— half of his interests of the assets accredited to Participant's ESOP Accounts as of October 15, 1991. This assignment of benefits will require that the Administrator of the Great Empire Broadcasting, Inc.'s ESOP segregate the Alternate Payee's interese. and that the secregated account will continue to accumulate interest at a rate equivalent to a one year certificate of deposit(.)

See Defendants' Motion for summary Judgment, Ex. C. Clearly, the Plaintiff agreed in a judicial setting to an order which caused the Plan Administrator to undertake the very actions of which Plaintiff now complains. In short, the Plaintiff has gotten exactly what she asked for, afld she is estopped from now complaining that her account has been

mistreated, as she herself consented to the treatment her account received.

Thus, even making all reasonable inferences in favor of the Plaintiff, the Court finds that the Plan Administrator gave the Plan a legally correct interpretatton, that the Plan Administrator did not act arbitrarily, and that the Plaintiff is estopped from asserting claims of misvaluation under 29 U.S.C. Sec. 1132(a)(1)(B). As the Plaintiff has no grounds for relief, summary judgement must be granted to the Defendants.

VI. Claims for Relief Under 29 U.S.C. Sec. 1132(a) (2)

The Plaintiff also has sued the Defendants under 29 U.S.C. Sec. 1132(a) (2) for breach of fiduciary duty on behalf of the Plan itself. To establish a cause of action under this section, the Plaintiff must show that the Plan Fiduciaries breached their duty, causing damage to the Plan; the Plaintiff must also show that the suit on behalf of the Plan comports with the procedural safeguards associated with other "representational suits," such as class or derivative actions. See Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140, 105 S.Ct. 3085, 3089 (limiting claims to "whole plan"); McMahon v. McDowell 794 F.2d 100, 109 (3d Cir. 1986); Thornton v. Evans, 692 F.2d 1064, 1079 (7th Cir. 1982); Mertens v. Kaiser Steel Retirement Plan, 744 F.Supp 917, 922 N.D. Cal. 1990), aff'd 948 F.2d 1205 (9th Cir. 1992) (engrafting the procedural safeguards of derivative actions onto Sec. 1132 (a) (2) suits).

The Plaintiff claims that the Plan fiduciaries have wrongly valued her account, segregated her account at the wrong time, endangered the Plan's tax status, failed to provide information, and failed to inform her of her right to a

disbursement in the form of stock. None of these claims is actionable under 29 U.S.C. Sec 1232 (a) (2), because none of these claims asserts a breach of fiduciary duty which has caused any monetary loss to the Plan. McDonald v. Provident Indemnity Life Ins. Co., 60 F.3d 234, 236-37 (5th Cir. 1995), Moreover, the Court has already found that the Plaintiff is an inappropriate representative of either the Plan or the class of Plan beneficiaries. Therefore, the Plaintiff is barred from bringing an action under 29 U.S.C. Sec. 1132 by the procedural safeguards associated with derivative actions. For all these reasons, the Court must grant the Defendants' motion for summary judgment.fn7

VII. Claims far Relief Under 29 U.S.C. Sec. 1132 (a) (3)

The Plaintiff also has sued the Defendants under 29 U.S.C. Sec. 1132 (a) (3) for misvaluation, wrongful segregation, endangerment of tax-status, failure to provide information, and failure to advise of the option of disbursement in the form of stack. To maintain an action under this section, the Plaintiff must Show that the Defendants engaged in wrongdoing, and that the wrongdoing should be remedied by equity through restitution, removal of fiduciaries, or injunction. Varity Corp., v. Howe, 116 S.Ct. 1065 11996). Regarding this last form of relief, a court may issue an injunction only when, consistent with public policy, the likelihood of irreparable loss to the Plaintiff overwhelms the potential harm to the party enjoined. See U.S. v. Price, 688 F.2d 204, 211 (3rd Cir. 1982).

As to the Plaintiff's claims of wrongful valuation and the failure to provide information, summary judgment is appropriate. See Order, May 13, 1997 (proper response to information requests); Sections III-VI, .girnra (proper valuation); See also Kleinhans v. Lisle Sav. Profit Sharing

Trust, 810 F.2d 618, 621—622 (holding that no action lies under 29 U.S.C. 1132 (a) (3) where, as here, the Plan participant is ultimately provided with information that is either to be automatically disclosed or disclosed pursuant to a request). Similarly, the Court must grant summary judgment on the Plaintiff's wrongful segregation claim: assuming, arguendo, that the Plaintiff's account really was segregated at the wrong time, the alleged error caused no pecuniary loss, will cause no future irreparable harm, and is not so Serious as to require the removal of a trustee. Hein v. F.D.I.C. 88 F.3d 210, 223-24 (3d Cir. 1996). Therefore, no equitable remedy is available, and the court must grant the Defendants summary judgment on these claims.

The Court also will grant summary judgment on the issue of "tax-status endangerment." The Plaintiff complains that the Plan's treatment of Q.D.R.O.'s, and the Plan's failure to advise its beneficiaries of their right to receive stock instead of cash, endangers the Plan's tax-exempt status. However, the Internal Revenue Service has reviewed both the Original and the Modified Plan (and the way that the Plan treats qualified domestic relations orders), and has approved the Plan for tax-deferred status. See Reply to Response to Defendants' Motion for Summary Judgment, Ex. A & B. Similarly, the Plan's failure to advise its beneficiaries of their right to a disbursement in the form of stock does not violate the Internal Revenue code. See 26 U.S.C. Sec 409(c), (h) (1).fn8 Moreover, even if the Plan has violated the tax code, it is plain from the evidence presented that the I.R.S. would give the Plan an opportunity to retroactively correct its violations, See Plaintiff's Response, Ex, E2.fn9 Thus, as the Plaintiff has not shown the need for restitution, nor the need for removal of a trustee, nor the likelihood of an irreparable harm necessary tar an injunction, summary judgment is appropriate.

Finally, the Court will also grant summary judgment on the claim arising from the Defendants failure to advise the Plaintiff of her right to a distribution in the form of stock instead of cash. Here again, the Plaintiff has not pled any facts sufficient to show that she requires restitution. Similarly, while the Court recognizes that the failure to advise may be a breach of fiduciary duty, the Court also finds that it is not such a serious dereliction of duty as to require the removal of the Plan Fiduciaries at this time. See Birdsell v. United Parcel Serv. of America, Inc. 94 F.3d 1130 (8th Cir. 1996). And, with regard to injunctive relief, the Plaintiff cannot show that the failure to advise has caused or will cause her any irreparable injury.fn10 Thus, here again, the Court can fashion no equitable remedy, and summary judgment therefore must be granted in favor of the Defendants on all claims arising under 29 U.S.C. Sec. 1132(a) (3).

VIII. Claims for Relief under 29 U.S.C. Sec. 1140

The Plaintiff also seeks relief under 29 U.S.C. Sec. 1140 for discrimination. In order to prevail, the Plaintiff must show that one or more of the befendants engaged in prohibited conduct with the specific intent of interfering, in the employment context, with the Plaintiff's rights. See Haberern v. Kaupp Vascular Surgeons Ltd. Defined Ben. Pension Plan, 24 F.3d 1491, 1503 (3rd Cir. 1994); Gravalik V. Continental Can. Co., 812 F.2d 834, 851 (3d Cir.) cert denied 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1997) (establishing the requirement of employment context); West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980) (same) ; Van Zant v. Todd Shipyards Corp. 847 F.Supp 69, 72 (S.D.Tex. 1994).

As established in the previous sections, the Plaintiff cannot show prohibited conduct on the part of the Defendants which, in any way, has interfered with the Plaintiff's rights. The Plaintiff also cannot establish an employment context for the complained-of behavior, For these reasons, summary judgment is appropriate.

IX. Motion to Amend Pleading

The Plaintiff has moved to amend her pleading under Federal Rule of Civil Procedure 15, apparently wishing to allege that the Defendants wrongly sent her offers or disbursement in May or 1995, thereby spawning the present lawsuit, Response at 8-9. In other words, the Plaintiff now wants to allege that the Defendants wrongly offered her a disbursement, that the erroneous offer caused the present lawsuit, and that the Plan was forced to expend money in its own defense. Response at 7-9. Under the federal rules of pleading, leave to amend a complaint must be freely given, absent the appearance of undue delay, dilatory purpose, undue prejudice, futility, or failure to enunciate claims. See Davis v. United States, 961 F.2d 53 (5th Cir. 1991); Rhodes v. Amarillo Hospital Dist., 654 F.2d 1148 (5th Cir. 1981) . As all of these factors are present in the current case, the Court will deny the plaintiff leave, to amend.

The motion to amend has been unduly delayed. The Plaintiff, an expert on ERISA law, has had sufficient information in her possession for the past eighteen months to reveal that the oflers of disbursement were sent in error. See Roorda v. American Oil Co., 446 F. Supp. 939 (W.D.N.Y. 1978) (holding that lack of diligence is sufficient ground to deny motion to amend). The motion also appears to have a dilatory purpose, in that it was submitted to avoid summary judgment See Wimm v. Jack Eckerd Corp., 3 F.3d 137 (5th Cir. 1993)

(holding that motion to amend submitted to avoid summary judgment may be found to be in bad faith). The pleading history also reflects this dilatory purpose, in that factually difficult-to-prove theories were submitted first, and then, when these failed, factually easier-to-establish theories were attempted by amendment. See Doscovy v. Gulf Coast Inv. Corp, 660 F.2d 594 (5th Cir. 1981) (discussing similar pleading history)

Furthermore, the motion to amend will cause undue prejudice to the Defendants, possibly denying them summary judgment because they have not moved against the unanticipated amendment. See Overseas Inns S.A. P.A. v. U.S., 911 F.2d 1146, 1151 (5th Cir. 1990). The motion to amend also would be futile, as it asserts a cause of action which is unripe: the question of whether the Plan has, in fact, been forced to incur expenses in its own defense will not be resolved until the Court decides if the Plan should be awarded costs at the end of this lawsuit. See 29 U.S.C. 1132(g); See also Winpisinger v. Aurora Corp., 469 F.Supp. 782 (N.D. Ohio 1979) (permitting court to award fees to either prevailing or losing party). Finally, the Plaintiff has not attached a proposed amended pleading to the motion to amend, thereby depriving this Court of a clear statement of her new claims. Davis v. United States, 961 F.2d 53 (5th Cir. 1991). For all these reasons, the motion to amend will be denied.

X. Conclusion

Accordingly, it is hereby ORDERED that the Plaintiff's Motion for Additional Time, received October 14, 1997, is DENIED. It is further ORDERED that the Plaintiff's Motion for Additional. Time, filed October 21, 1997, is Denied. It is further ORDERED that the Great Empire Defendants' Motion for Summary Judgment, filed October 2, 1997, is

GRANTED. It is further ORDERED that Defendant Menke and Associates, Inc.'s Motion for Summary Judgment, filed October 10, 1997, is GRANTED. It is further ORDERED that the Plaintiff's Contingent Motion for Reinstatement or Amendment or Realignment, received October 14, 1997, is DENIED.

SIGNED and ENTERED this 10th of November 1997.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

fn1The Plaintiff's motion was received on that day, but technically not filed until later, because itwas part of a pleading longer than twenty pages in length.

fn2 Defendant Menke and Associates moved to join in the Great Empire Defendants' Motion for Summary Judgment. See Defendant Menke & Associates, Inc's Motion for Summary Judgment, filed October 10, 1997. For convenience, the Court will treat the Great Empire Defendants' Motion for Summary Judgment as if it was made by all the Defendants in the present case.

fn 3See Note 1, supra.

fn4See Note 1, supra.

fn5The Plaintiff has been long involveded with ERISA matters. See Plaintiff's Response to Defendants' Motion for Partial Summary Judgment on Attorney's Fees, ifled February 11, 1997, Ex B. (statement by Bruce Anderson that Plaintiff's involvement with ERISA issuses came about "long beforet he present lawsuit was filed and/or expected.") The

Plaintiff also has made a presentation to at least one legal seminar on ERISA. Id. at 11. Moreover, the Plaintiff also has written at least one article on ERISA law. See Attachemnt B to Great Empire Defendant's Reply to Plaintiff's Response to Defendants' Motion for Parital Summary Judgment on Fraud, Conversion and State Securities Law Claims, filed Febnruary 14, 1997 (article titled "The Employee Retirement Income Security Act of 1974 as a Shield Against Tort Damages for Malpractice Asserted Against...Plans And as a Counter to Assertions that Health Care Plan Contracts Establish a Physician/Patient Relationship).

fn6Indeed, the Court has been able to rule on the Motion for Sumnmary Judgment without reference to any of these issues.

fn 7The Court also finds that, with the exception of the claims regarding the failure of the Defendants to advise the Plaintiff of her right to a disbursement in the form of stock, these complaints do not rise to the level of fiduciary breaches. See Section VII, infra.

fn 8uThis provision of the Internal Revenue Code provides that an ERISA plan is eligible for special tax status if its participants have the right to demand benefits in the form of securities. There is nothing in this statute which requires that every offer of disbursement must remind the a plan participant of his right to demand stock. While it may be a fiduciary breach to not inform a participant of his rights, such a fiduciary breach does not, standing along, violate the letter of the law. See 26 U.S.C. 409(c), (h)(l) (1988 & Supp. 1997).

fn9Exhibit E2 is a copy of the IRS checklist sent to Great Empire Broadcasting so that Great Empire could see what it had to do in order to assure its ESOP would have a beneficial

tax status. The checklist clearly indicates that if the Plan's previous actions were not in compliance with the tax codes, the Plan would need to retroactively amend to bring the Plan into compliance.

fn 10The Plaintiff cannot show that she herself is likely to suffer any irreparable injury in the present case clearly, she knows that she is entitled to 4 distribution in the form of stock. See Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.26 at 621-fl. Moreover, assume, arguondo, that a Plan Participant accepted cash when he would have preferred to accept stock, that he used his cash disbursement to purchase stock, and that the Participant was therefore forced to bear the transaction costs associated with the stock purchase. The Plan Participant in this hypothetical case could claim restitution for his the transactional expenses, but could hardly claim that his injury was irreparable. The absence of irreparable injury means injunctive relief is not necessary.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Patricia Matassarin,
Plaintiff

v.

F.F. Mike Lynch, et. al.,
Defendants.

Civil Action No. SA-97-CVF-0482

Dated 3-13-97

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

On this date came to be considered the motion by Defendant Menks and Associates for Partial Summary Judgment on Securities Law claims, ruled December 5, 1996 (doc. 83), the Plaintiff's Response, filed December 16, 1996 (doc. 86), Defendants Don T. Buford and Curtis W. Brown's Motion for Partial Summary Judgment on Securities L.aw Claims, filed January 24, 1997 (doc. 110), and the Plaintiffs response, filed February 4, 1997 (doc. 113). After careful consideration, the Court will grant both motions.

1. Background

The Plaintiff in this case is attempting to sue the trustees of an ERISA plan for wrongdoing, claiming relief under the Securities Acts of 1933 and 1934. The Defendants have moved for summary judgment, claiming that the ERISA plan in question is not a security within thu meaning of those acts.

2. Legal standards

Employee benefit plans that are either non-contributory or nan-voluntary are not securities, and therefore do not fall within the anbit of the Securities Act of 1933 or the Securities Act of 1934. Uselton v. Commercial Lovelace Motorfreight, Inc., 940 F.2d 564, 573-74 (10th Cir. 1991).

3. Application of Law to Facts

In the present case, there is a genuine issue of material fact regarding whether the ERISA plan at issue is voluntary or involuntary. The Defendants have produced an affidavit from Danny Jenkins, a trustee of the plan, which suggests that all employees can participate in the plan after one year of employment witheut any action on their part. This does not suffice to establish that the plan is non—voluntary: from the wording of the affidavit, it seems possible that an employee could opt out of the Plan. If an employee can opt out of the Plan, then the plan is voluntary.

However, the Defendant has presented through affidavit evidence suggesting that the ERISA plan in question is non-contributory. The Defendant has also furnished the court with a copy of the relevant portion of tha plan document itself, which establishes that members of the Plan do not themselves contribute to the plan rather, the Company contributes to the plan each year. The Plaintiff has presented no evidence, in the form of affidavits or otherwise, to adequately contest the nature of this plan. Furthermore, the Plaintiff's arguments suggesting that the ERISA plan constitutes such a large portion of an employee's total and indivisible compensation package that the plan qualifies as a security is unpersuasive See International Brotherhood of Teamsters v. Daniel, 439

U.S. 551, 561-62. In short, while .om. employee. may treat perceive the plan as an important investment opportunity, it is clear that the decision to accept and retain covered employment is a function of the economic realities facing that employ... Accordingly, the Court finds that the plan is non-contributory. Therefore, the Court finds that the ESOP plan is not a security within the meaning of the 1933 or 1934 Securities Act. Uselton 940 F.2d at 573-74; Daniel 439 U.S. 561-62.

4 Conclusion

Because of the above findings, it is hereby ORDERED that the Motion by Defendants Don T. Burford and Curtis W. Brown for Partial Summary Judgment is GRANTED. It is further ORDERED that the Motion by Defendant Menke and Associates for Partial Summary Judgment is GRANTED

SIGNED and ENTERED this 12th March, 1997

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Patricia Matassarin, et al
Plaintiff

v.

F.F. Mike Lynch, et. al.,
Defendants.

Civil Action No. SA-97-CVF-0482

Dated 12-4-96

ORDER DENYING MOTION FOR CLASS CERTIFICATION

On this date came to be considered the Plaintiff's Motion for Class Certification, filed August 21, 1996, the Defendants' Responses to the Motion for Class Certification, filed August 30, 1996, the Plaintiff's Reply to the Response, tiled September 16, 1996, and Defendants' Supplemental Response, filed September 27, 1996, the Plaintiff's Supplemental, filed November 11, 1996, and the Defendants' Second Supplemental Response, filed November 11, 1996. After careful consideration, the Court is of the opinion that the Motion for Class Certification should be denied.

As provided by Federal Rule of Civil Procedure 23, a party seeking class certification must establish the existence of four prerequisites. See Castano v. American Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996), citing General Tel. Co. v. Falcon,

457 U.S. 147, 102 S.Ct. 2364, 2372 (1982) and Appelwhite v. Reichhold Chemicals, Inc., 67 F.3d 571 (5th Cir. 1995). First, it must be shown that the class is so numerous that joinder of all members is impracticable. Appelwhite, 67 F.3d at 573; Fed. R. Civ. Pro. 23. Second, there must be questions of law of fact common to the class. Appelwhite, 67 F.3d at 573; Fed. R. Civ. Pro. 23. Third, the claims or defenses of the representative parties are typical of the claims or defenses of the class. Appelwhite, 67 F.3d at 573.And finally, fourth, the class action will be maintained only if representative parties can fairly and adequately protect the interests of all members of the class. Appelwhite 67 F.3d at 573; Fed. R. Civ. Pro. 23. Failure, to establish any one of these prerequisites will defeat class certification. Appelwhite 67 F.3d at 575.

1. The named Plaintiff is inadequate as class representative because of her antagonism toward a named defendant and her antagonism toward settlement.

Whether a party would adequately protect the interests of the class is a question of fact dependent on the circumstances of each case. McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981). In order to qualify as an adequate representative, the named plaintiff must have common interests with the unnamed members of the Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973). In determining adequacy, it should be considered whether any potential antagonism exists between the interests of the plaintiff and those of the class. Fowler v. Birmingham New. Co., 608 F.2d 1055 (5th Cir. 1979). Furthermore, a trial court may consider the Plaintiff's vindictiveness toward the defendant in determining whether the plaintiff is an adequate

representative. Smith v. Ayres, 977 F.2d 946, 948 (5th Cir.1992).

In the present case, the Plaintiff's potential vindictiveness toward one of the named defendants her ex— husband makes her an inadequate class representative. The named Plaintiff and her ex-husband have been involved in previous litigation, and while that previous litigation bears no direct relationship to the motion for class certification, it does suggest a continuing and virulent antagonism between them(fn1) — an antagonism that itself renders the Plaintiff an inadequate representative. See 977 F.2d at 948.

Moreover, the Plaintiff admits that she has another potential claim to bring against the Defendants. This raises the possibility that class action status, if granted in the present case, couild be used as leverage in the upcoming lawsuit. Motion for Class Certification at 17 (a potential suit invovling a 401K plan "unrelated to this lawsuit at this time"). Such potential "leverage" provides an additional reason why the named Plaintiff is inadequate as a class representative. See Quigley v. Braniff Airways, Inc. 85 F.R.D. 74, 84 (N.D. Tex. 1979) (there must be an absence of conflict or antagonism between interests of the named plaintiff in the subject matter of lititgation and those of other members of the proposed class). For this reason, the Court finds the Plaintiff inadequate to represent the proposed class.

2. The adequacy prerequisite is also not met because counsel is unqualified to litigate ths present case.

Furthermore, even if the Court fouind that the named Plaintiff was an appropriate representative, the Court still could not conclude that adequacy prerequisite had been

satisfied. Adequacy requires, in addition to a proper representative party, the vigorous prosecution of class interests through qualified counsel Gonzales v. Cassidy, 474 F2d 1973 (5th Cir.1973); Quigley v. Braniff Airways Inc., 85 F.R.D. 74, 84 (N.D.Tex 1979); Odmark v. Mesa Limited Partnership, 1992 WL 203541 N.D.Tex.1996). In the present case, the attorney is improper because the attorney herself is the class representative, and therefore she operates under an impermissible conflict of interest.

The Fifth Circuit has adopted a per se rule that an attorney who is the partner or spouse of a named class representative is disqualified from acting as counsel for the class. Zylstra v. Safeway Stores, Inc., 578 F.2d 102, 104 (5th Cir.1978), following Kramer v. Scientific Control Corp., 534 F.2d 1085 (3rd Cir. 1976), cert. denied 429 U.S. 830 (1976). The reason for this rule is obvious, given the potential conflict that arises When a class representative stands or appears to stand to gain financially from an award of attorney's fees made out of a class fund. Zylstra at 104. See also Phillips v. Joint Legislative Committee on Performance and Expenditure Review of State of Mississippi 637 F.2d 1014, 1023 (5th Cir. 1981).

In the present case, the conflict of interest is strikingly apparent. The attorney who represents the class is hereself the named class representative. If the Plaintiff were to prevail on her state law claims, but lose on htose federal claims that permit an award of litigation costs, then the Plaintiff would stand to gain financially from an award of attorney's fees made out of a class fund. this violates the rule of Zylsta. Therefore, class certification on the present motion would be impossible.(fn2)

3. Other Issues

The Court further notes that even if the named Plaintiff were an adequate representative, and if proper counsel had been retained, the Court still might not grant class certification. The Plaintiff has asserted relief for several different classes, but not all of these classes are numerous enmough to justify class certification. See Davis v. Roadway Exp., Inc., 621 F. 2d 775 (5th Cir. 1980). Furthermore, at least some of the Plaintiff's claims might be more properly brought as EIRSA derivitive suits under Rule 23.1 rather than as Rule 23 class actions. Diduck v. Kaszycki & Sons Contractors, Inc., 737 F. Supp. 792 (S.D.N.Y. 1990). As a result action status may be improper with regard to these claims. Kaufman v. Dreyfus Fund, Inc. 434 F.2d 727 (3rd Cir. 1970), cert. denied 401 U.S. 974, 91 S.Ct. 1190, 28 L.Ed.2ed. 323. Finally, the Plaintiff has brought a number of state law as well as federal claims. These claims may so swamp the litigation as to defeat the predominance of common questions of law or fact. Castano, 84 F.3d at 741. However, because adequate grounds exist for denying class certification, the Court will not reach these issues.

4. Conclusion

Accordingly, it is hereby ORDERED that the Motion for Class Certification is DENIED.

SIGNED and ENTERED this _____ day of December 1996.,

D C. PRADO
UNITED STATES DISTRICT JUDGE

fn1 See Plaintiff's Supplemental Reply at 12 ("Plaintiff's Reply to the Great Empire's Response at 10 (charterizing the

arguments of opposing cousnel as "whining"). Id. at 15-16 (accusing the Defendants in settlement negotiations of engaging in "extortionary tactics," omissions," "insults and threats", "coercion," and "retaliation."). See also Plaintiff's Supplemental Reply at 11 (implication that a new argument shows bad faith), 12 (charcterizing opponents as "clever" but "Wrong!").

fn2 As per Phillips, 637 F. 2d at 1022, the Court could not deny class certification merely because of the potential conflict-of-interest, but instead would need to order the retention of new cousnel. In the present case, the retention of new counsel is unnecessary, because the Court can deny the class certification on other grounds.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Patricia Matassarin, et al
Plaintiff

v.

F.F. Mike Lynch, et. al.,
Defendants.

Civil Action No. SA-97-CVF-0482

Dated 11-25-96

ORDER GRANTING GREAT EMPIRE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON SECURITIES LAW CLAIMS

On this date came to be considered the Great Empire Defendants' Notion for Partial Sununary Judgment on Securities Law Claims, filed October 23, 1996, and Plaintiffs' Response to Great Empire Defendants' Motion for Partial Summary Judgment on Securities Law Claims, filed November 15. 1996, in the above-styled and numbered cause. After careful consideration, the Court is of the opinion that ths motion should be granted.

1. Summary Judgment Standard.

Motions for summary judgment are authorized by Rule 56 of the Federal Rules of Civil Procedure These motions permit the Court to resolve lawsuits without the necessity of trials if there is no genuine dispute as to any facts which are material

and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(a); Fields v. City of South Houston. Texas, 922 F.2d 1183, 1187, (5th Cir. 1991); Lavespere v. Niagra Machine & Tool Works. Inc., 910 F.2d 167, 177—78 (5th Cir. 1990), rehearing denied, 920 F.2d 259 (5th Cir. 1090); and Lodge Hall Music. Inc. v. Waco Wrangler Club. Inc., 831 F2d 77, 79 (5th Cir. 1987).

> Rule 56(e) of the Federal Rules of Civil Procedure provides in part
>
> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mar. allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Fed.R.Civ.P. 56(e). Thus, a court may grant a motion for summary judgment if the opposing party fails to present controverting evidence.

In the usual case, the party who seeks summary judgment must show by affidavit or other evidentiary material that there is no gsnuin. dispute as to any fact material to resolution or the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 8.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 250 n.4, 106 S.Ct. 2505, 2511 n2, 91 L.Ed.2d 265 (1986); Yields v. City of South Houston, Texas, 922 F. 2d 1183, 1187 (5th Cir. 1991); Lavespere v. Niagra Machine & Tool Works. Inc., 910 F.2d 167, 178 (5th Cir. 1990); Isquith v. Middle South

Utilities, Inc., 847 F. 2d 185, 198 (5th Cir. 1988); and Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986). In order for the Court to find there are no genuine material factual issues, the Court must be satisfied that no reasonable trier of fact could have found for the nonmoving party or, in other words, that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict for the nonmovant. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 249-50, 106 S.Ct. at 2510-11; Matsushita Electrical Industrial Co.,___Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); Lavespere v. Niagra Machine & Tool Works. Inc., 910 F.2d at 178; Bach. v. American Telephone & Telegraph Co., 840 F.2d 283, 287 (5th Cir 1988); and Williams v. Adams, 836 F.2d 958, 961 (5th air. 1988). To satisfy this burden, the movant must either submit evidentiary documents that negate the existence of some material element of the nonmoving party's claim or defense or, if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmoving party's claim or defense. See Celotex Corp. v. Catrett, 477 U.S. at 325, 106 S.Ct. at 2552; Lavespere v. Niagra Machine & Tool Works, Inc., 910 F.2d 178; Isquith v. Middle South Utilities, Inc., 847 F.2d at 198-99; and Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986).

Once the moving party has carried that burden, the burden shifts to the nonmoving party to show that summary judgment is not appropriate. See Fields v. City of South Houston. Texas 922 P.2d at 1187; Lavespere v. Niagra Machine & Tool Works. Inc., 910 F.2d at 178; and Lodge Hall Music. Inc. v. Waco Wrangler Club Inc., 83]. F.2d 77, 79 (5th Cir. 1987). The nonmoving party cannot discharge

this burden by referring to the mere allegations or denials of the nonmoving party's pleadings; rather, that party must, either by submitting opposing evidentiary documents or by referring to evidentiary docuasnts already in the record, set out specific facts showing that a genuine, issue exists. See Celotex Corp. V. Catrett, 477 U.S. at 324, 106 S.Ct. at 2553; Fields v. City of South Houston Texas, 922 F.2d at 1187; Lavespere V. Niagra Machine & Tool Works. Inc., 910 F.2d at 178; Isquith v. Middle South Utlities Inc., 847 F.2d at 198-99; and Fed.R.Civ.P. 56(e).

Where the party opposing the motion for summary judgment will have, the burden of proof on an essential element of his case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, summary judgment may be entered against him. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 92. L.Ed.2d 265 (1986); Fontenot v UpJohn Co., 780 F.2d at 1194-95.

2. The Plaintiff have not made, a showing sufficient to establish the existence of an essential element of her claim.

In the present motion, the Defendants argue, in essence, that insufficient svid.nc. exists to show that the ESQP plan is a security. This issue is critical to the Plaintiff's case: if the ESOP plan does not qualify as a security, then the Plaintiff is not entitled to assert claims under either the 1933 of 1934 Federal Securities Acts. Moreover, the Plaintiff will have th. burden at trial of showing that the ESOP plan is a security. Therefore, the Defendant has the requirements of a proper summary judgment pleading. Celotex, 477 U.S. at

325, 106 S.Ct. at 2552; Lavespere 910 P.2d 178; Isquith, 847 F.2d at 198-99.(fn1)

It thus falls to the plaintiff to show that summary judgment is not appropriate. See Fields, 922 F.2d at 1187; 910 F.2d at 178; Lodge Hall Music, 831 F.2d 77, 79 (5th Cir.1987). In other words, the Plaintiff must show that a genuine issue of material tact exists regarding whether the ESOP plan qualifies as a security. To do so, the Plaintiff needs to establish three propositions — that the ESOP plan involves the investment of money, that the ESOP plan is in a common enterprise, and that the profits from that enterprise stem solely from the efforts of others. SEC v W. J. Howie Co., 328 U.S. 293 (1946).

The Plaintiff has failed to establish for summary judgment purposes the third portion of the Howie test. It is true, the Plaintiff does assert that "the value of the benefit given to ESOP plan members depends upon the management of the ESOP trust and the appreciation of value of the stock that they hold." Response at 10. However, the Plaintiff presents no evidence to support this assertion, and unsupported conclusions will not defeat a motion for summary judgment.

To defeat a motion for summary judgment, the Plaintiff must introduce specific facts, either by submitting opposing evidentiary documents or by referring to evidentiary documents already in the record. See Celotex, 477 U.S. at 324, 106 S.Ct. at 2553; Fields, 922 F.2d at 1187; 910 F.2d at 178: Isquith, 847 F.2d at 198-99; and Fed.R.Civ.P. 56(e), The Plaintiff has failed to make any such submission for the present motion. Decause the Plaintiff has failed to identify specific evidence in the record, or to articulate the precise manner in which such evidence supports her claim that the ESOP plan is a security, the plaintiff has not sufficiently

established, for summary judgment purposes, an essential element of her claim. See Stults v. Conoco, Inc. 76 F.3d 651, 656 (5th Cir. 1996)

Where the party opposing the motion for summary judgment will have the burden of proof on an essential element of his case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, summary judgment may be entered against him. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); Fontenot v. Upjohn Co., 780 F.2d at 1194-95.

Consistent with Celotex Corp. and Fontenot, the Court will. grant summary judgment against the Plaintiff on the federal securities law claims.

3. Conclusion

Accordingly, it is hereby ORDERED that the Defendant Great Empire's Motion for Partial Summary Judgment on Securities Law claims will be GRANTED, and those portions of the Plaintiff's Complaint asserting relief under the Federal Securities Act of 1933 and the Securities Act Of 1934 are DISMISSED.
SIGNED and ENTERED this ___ of November 1996.

fn1The defendant also presented the affidavit of Danny E. Jenkins, which provides an alternative basis to satisfy the requirements of a proper summary judgment pleading.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Patricia Matassarin,
Plaintiff

v.

F.F. Mike Lynch, et. al.,
Defendants.

Civil Action No. SA-97-CVF-0482

Dated 7-10-97

ORDER DENYING MOTION FOR RECUSAL

On this date came to be considered the Plaintiff's Motion to Recuse, filed July 11, 1997. After careful consideration, the Court will deny the motion.

Facts and Procedural Posture

On July 7, 1997, the Plaintiff made a telephone call to the District Clerk's Office to inquire about "the nearly three week delay in receiving a copy of the Court's order striking her jury demand." See Affidavit of Prejudice, filed July 11, 1997. The Plaintiff spoke with two members of the District Clerk's Office, and to a law clerk of the judge hearing this case. As a result of that phone conversation, it became apparent that a typographical *error* appeared in the order.(fn1)

On that same day, the Court issued an order which corrected the typographical error. In a footnote to that order, the Court warned all parties and litigants that, in the future, the Court would expect them to treat court personnel —— including the staff of the District Clerk's Office —— with courtesy and civility, and to not impugn the integrity of the court. See Local Rule AT-4; Texas Lawyer's Creed IV(3). The Plaintiff, based mainly upon this footnote, argues that the law clerk to this Court has improperly shown prejudice against the Plaintiff, and that this bias has rendered this Court incapable of rendering a Just verdict. Accordingly, the Plaintiff has moved for recusal.

Analysis

In Sidag Aktiencesellschaft v. Smoked Foods Products, 969 F.2d 1562 (5th Cir. 1992), a panel for the Fifth Circuit suggested that, when it appears that attorney acrimony threatens to erupt in rudeness, it is proper for a court to issue gentle warnings about the civility. Faced with some ongoing examples of rudeness, the Sidag court held:

> We Caution therefore all counsel involved that any (rude) acts henceforth taken in furtherance of this Case, whether remotely or directly related to those with which we deal today, will not be met with so mild and gentle a judgment as the one we now render. To the contrary, instigator(s) will risk exposure to the full panoply of sanctions at our disposal. We trust that shall not prove necessary. our trust being grounded in the assumption that each such attorney is wise, so a was word—-or, more accurately in this instance, several words--should be sufficient.

969 F.2d at 1562 - — 1563. Thus, the language of Sidag provides that, when a court feels that litigants may be contemplating improper behavior, it is within that court's power to remind counsel of their manners.

In the present case, the Court has been informed on three separate occasions by members of the District Clerk's Office that the Plaintiff has behaved rudely toward them,(fn2) After two of these complaints (from two separate people), the Court, in a footnote, issued a warning to all parties on their duty of civility

The Court at this time will also warn all parties that, in conversations with Court personnel (including members of the District Clerk's Office), the Court expects parties and lawyers to treat *Court* staff with courtesy and civility. See Texas Lawyer's Creed, VI(3). In the future, failure of any party or lawyer to conform their behavior to these expectations may result in sanctions.

See also Local Rule *AT-4* ("No attorney permitted to practice before the Court shall engage in any conduct which degrades or impugns the integrity of the Court[.]")

This footnote, done in the style of Sidag, did not constitute a finding of fact against any party. Instead like the language of Sidag it merely warned all parties to behave like professionals.

Despite the Plaintiff's belief to the contrary, no law clerk to this Court has ever suggested that the Plaintiff was personally rude to him or impugned to him the integrity of the Court.

Additionally, the Plaintiff has no personal knowledge sufficient to support her assertion that a law clerk to this

Court has ever made any representations whatsoever about her July 7 phone conversation with him and indeed, no such representations have ever taken place.(fn3) Even the complained-of footnote does not accuse the Plaintiff of impugning the integrity of the Court; at most, it can be read to suggest that Ms. Matassarin may have been rude to members of the District Clerk's Office. The gentle nature of the Court's reminder, the fact that two employees of the District Clerk's Office have complained about the Plaintiff's behavior, and the apparent lack of animus on the part of the Court's law clerk, all lead this Court to conclude that no bias, extrajudicial. or otherwise, has been shown against the Plaintiff. See Sidag (establishinq that the complained—of footnote is not an unusual warning); In re___Hipp.___Inc., 5 F.3d 109 (5th Cir. 1993) ("Disqualification is appropriate if a reasonable person, knowing all the relevant circumstances, would harbor doubts about the judges impartiality. Adverse rulings against the defendant in the same or a prior judicial proceeding do not render the judge biased.") See also Travelers Ins. Co. v. St. Jude Medical Office Bldg., Ltd. Partnership, 843 F.Supp. 138, amended 154 F.R.D. 143 (E.D.La. 1994) (holding that bias must stem from extrajudicial source and result in opinion on merit on some basis other than what judge learned from his participation in case) Person v. General Motors Corp., 730 F. Supp. 516 (W.D.N.Y. 1990) (defining extrajudicial to mean conduct which arises from something outside of court proceedings).

Stated briefly, the Court must conclude that, even if all properly-pled facts in the affidavit of prejudice are considered true, the Plaintiff still has failed to show that this Court or its law clerk bear any bias against her. The Court, through these Judicial proceedings, has received complaints that the Plaintiff his been rude to members of the District Clerk's Office; these complaints led the Court to issue a

general warning to and *not* to be rude to Court personnel. The Court has made no findings of fact with regard to the Plaintiff and her interactions with the District Clerk's Office. It is impossible, given these set of circumstances, to reasonably conclude that the Court has treated the Plaintiff differently than it would treat any other litigant. Accordingly, it is hereby ORDERED that the motion for recusal is DENIED.

SIGNED and ENTERED this 16, July 1997

PATRICIA J. MATASSARIN, Individually, for and on behalf of The Great Empire Broadcasting Employee Stock Ownership Plan and its Beneficiaries; for and on behalf of that class of persons, participants and/or Beneficiaries of The Great Empire Broadcasting Employees Stock Ownership Plan, Past or Present, Defrauded, Plaintiff-Appellant, versus F.F. MIKE LYNCH, Individually and as Trustee for The Great Empire Broadcasting Employees Stock Ownership Plan (ESOP); MICHAEL C. OATMAN, Individually and as Trustee for The Great Empire Broadcasting Employees Stock Ownership Plan (ESOP); DANNY E. JENKINS, Individually and as former Trustee of the ESOP and Agent of the Trustees and Agent of the Administrator of The Great Empire Broadcasting Employees Stock Ownership Plan; Great Empire Broadcasting, Inc., Individually and as a Plan Administrator for The Great Empire Broadcasting Employees Stock Ownership Plan, and The Great Empire Broadcasting Employees Stock Ownership Plan "Administrative Committee"; GREAT EMPIRE BROADCASTING INC., Individually and as Plan Administrator for the Great Empire Broadcasting Employees Stock Ownership Plan; KAREN K. WARNER, CPA, Individually and as a member of the Great Empire Broadcasting Employees Stock Ownership Plan "Administrative Committee"; UNKNOWN MEMBERS OF THE "BOARD OF DIRECTORS", of the Great Empire Broadcasting Employees Stock Ownership Plan; MENKE & ASSOCIATES, INC.; DON T. BUFORD; CURTIS W. BROWN, Defendants-Appellees.

No. 97-51081

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

filed: 7/12/99

ON PETITION FORE REHEARING EN BANC

Before EMILIO M. GARZA, BENAVIDES, and DENNIS, Circuit Judges

Per Curiam:

Treating the Petition for Rhearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and 5th Cir R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Patricia Matassarin, et al
Plaintiff

v.

F.F. Mike Lynch, et. al.,
Defendants.

Civil Action No. SA-97-CVF-0482

Dated 7-10-97

SHOW CAUSE

On August 29, 1996, the Court entered an Order granting Plaintiff's counsel leave to appear pro hac vice in the above-styled and numbered cause. As part of that decision, the Court further ordered Plaintiff's counsel to make application for admission to practice before the United States District Court for the Western District of Texas within sixty days. It was further ordered that counsel should become familiar with the Local Court Rules of the United States District Court for the Western District of Texas.

It has come to the Courts attention that Plaintiff's counsel has not complied with this Court's Order. Specifically, counsel has made no application for admission to practice before the United States District Court for the Western District of Texas.(fn1) Accordingly, the Court will order that the Plaintiff's counsel will show cause on or before December 5, 1996, why she should not be sanctioned for failure to comply

with the Court's Order of August 15, 1996. A failure to show cause by that date may result in sanctions up to and including a dismissal of the action under Fed.R.Civ.Pro. 41(b). Proof of an application for admission to practice in the Western District, filed by that date, will satisfy this order to show cause.

Accordingly, it is hereby ORDERED that the Plaintiff's counsel will SHOW CAUSE on or before December 5. 1996 why she should not be sanctioned for failure to comply with the Court's Order of August 15 1996. Failure to do so will result in sanctions, up to and including dismissal of the current action. Filing proof of an application for admission to practice in the Western District on or before December 5. 1996 will satisfy the requirements of this order.

SIGNED and
ENTERED this
13 day of
November 1996.

fn1 Moreover, plaintiff's counsel has not complied with a Local Rule CV—7(i) (regarding discovery motions) nor CV-16 (regarding the timing of discovery).

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Patricia Matassarin, et al
Plaintiff

v.

F.F. Mike Lynch, et. al.,
Defendants.

Civil Action No. SA-97-CVF-0482

Dated 7-7-97

ORDER

On this date came to be considered the status of the above-styled and numbered cause.

On July 7, 1997, the Plaintiff informed the Court through a telephone conversation(fn1) with personnel in the District Clerk's office that an order entered by the Court seemed to contain a typographical error. After a review of the record, the Court finds that the Plaintiff is correct. In Doc. No. 145 the date on the document suggests that the order was signed on June 16, 1997. The order should read that it was signed on June 30, 1997. The Court will order this matter corrected.

Accordingly, it is hereby ORDERED that the District Clerk's Office will amend the record to reflect that Doc. No. 145 was signed on June 30, 1997 and filed on July 2, 1997.

SIGNED and ENTERED this 7 of

UNITED STATES
DISTRICT JUDGE

fn1The Court at this time will also warn all parties that, in conversations with Court personnel including members of the District Clerk's office), the Court expects parties and lawyers to treat Court staff with courtesy and civility. Texas Lawyer's Creed, IV(3). In the future, failure of any party or lawyer to conform their behavior to these expectations may result in sanctions. Local Rule AT-4 ("No attorney permitted to practice before the Court shall engage in any conduct which degrades or impugns the integrity of the Court[.]")

ALEXANDER, FLOODMAN, CASEY & JENKINS, CHTD.
204 Corporate Place
125 North Emporia
Wichita, Kansas 67202
318-289-1100

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY,
KANSAS DOMESTICE DEPARTMENT

IN THE MATTEWR OF THE MARRIAGE OF
PATRICIA H. JENKINS
AND
DANNY E. JENKINS

CASE NO. 91 D 3600

PURSUANT TO CHAPTER 60 OF THE KANSAS STATUTES ANNOTATED

QUALIFIED DOMESTIC RELATIONS ORDER

COMES NOW on this day of , 1992 this matter ocmes on before the court prusuant tothte Journal Entry of Judgment and Decereee of Divorce of the District Court of the State of Kansas, in and for the County of Sedgiwick, dated October 15, 1991, Case No. 91 D 3600 concerning the marriage of Danny E. Jenkins and Patricia H. Jenkins, it is agreed that this provision is intended to serve as a Qualified Domestic Relations Order ("QDRO"). Danny E. Jenkins, Hereinafter referred to as "Husband", assigns a protion of his retirement

benefit under the retirement benefit plan specified below to Patricia H. Jenkins, herinafter referred to as "Wife".

1. The Husband's retirement benefit plan subject to this Order is as follows:

a) Great Empire Broadcasting, Inc., Employee Stock Ownership Plan.

b) The Plan Administrator is: Danny E. Jenkins, 4200 North Old Lawrence Pond, P.O. Box 1402, Wichita, Kansas 67201.

2. the Participant in the Great Empire Boradcasting, Inc. ESOP is the Husband, Danny E. Jenkins, whose Social Security Number is 510-52-0964, and whose last known address is 507 North Amour, Wichita Kansas 67026.

3. The "Alternate Payee" is his Wife, whose Social Security Number is 511-54-2233, and whose last know address is 8018 Wood Spring Way, #308, Wichita Kansas 67225.

4. The Husband assigns to the Wife as Alternate Payee one-half of his interest of the assets accredited to Participant's ESOP Accounts as of October 15, 1991. This assignment of benefits will require that the Administrator of the Great Empire Boradcasting, Inc. ESOP segregate the Alternate Payee's Interest, and that said segregated account will continue to accumulate interst at a rate equivalent to a one-year Certificate of Deposit.

5. This assignment of benefits does not require that the Plan provide any type or form of benefit, or any option, not otherwise provided under the Plan. This assignment does not require that the Plan provide increased benefits (determined on a basis of actuarial to equivalent values.) This assingment

does not require the Plan to provide benefits to the Alternate Payee which are not required to be paid to another Alternate Payee under another Order previously determined to be a Qualified Domestic Relations Order.

6. The parties agree that the Court shall retain jurisdiciton over the assignment agreement to amend it in order to establish or maintain its qualification as a QDRO under the Internal Revenue Code as amended.

Lyle Baker
District Court Judge

STATUTORY PROVISIONS INVOLVED:

29 U.S.. § 1056 (d) **Assignment or alienation of plan benefits**

(1) Each pension plan shall provide that benefits provided under that plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph--

(i) the term "qualified domestic relations order" means a domestic relations order--

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an

alternate payee the right to, receive all or a portion of the benefits payable with respect to to a participant under a plan, and

(II) with respect to which the requirements of sub-paragraphs (C) and (D) are net, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which--

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law(including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies--

(i) the name and the last known mailing address if any of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined.

(iii) the number of payments or period to which such order applies,

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order-

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

26 U.S.C. § 4975(e)(7) **Employee stock ownership plan**. --The term "employee stock ownership plan" means a defined contribution plan--

(A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and

(B) which is otherwise defined in regulations prescribed by the Secretary.

A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of section 409(h),section 409(o), and, as applicable, section 409(n) and, if the employer has a registration-type class of securities (as defined in section 409(e)(4)), it meets the requirements of section 409(e).

26 U.S.C. § 409(h) **Right to demand employer securities: put option. --**

(1) In general.-- A plan meets the requirements of this subsection if a participant who is entitled to a distribution from the plan--

(A) has a right to demand that his benefits be distributed in the form of employer securities, and

(B) if the employer securities are not readily trade-able on an established market, has a right to require that the employer repurchase

employer securities under a fair valuation formula.

(2) **Plan may distribute cash in certain cases**.--A plan which otherwise meets the requirements of this subsection or of section 4975(e)(7) shall not be considered to have failed to meet the requirements of section 40l(a) merely because under the plan the benefits may be distributed in cash or in the form of employer securities. In the case of an employer whose charter or bylaws restrict the ownership of substantially all outstanding employer securities to employees or to a trust described in section 40l(a), a plan which otherwise meets the requirements of this subsection or section 4975(e)(7) shall not be considered to have failed to meet the requirements of this subsection or of section 40l(a) merely because it does not permit a participant to exercise the right described in paragraph (l)(A) if such plan provides that participants entitled to a distribution from the plan shall have a right to receive such distribution in cash, except that such plan may distribute employer securities subject to a requirement that such securities may be resold to the employer under the terms which meet the requirements of paragraph (l)(B).

(3) **Special rule for banks**.--In the case of a plan established and maintained by a bank (as defined in section 581) which is prohibited by law from redeeming or purchasing its own securities, the requirements of paragraph (1)(B) shall not apply if the plan provides that participants entitled to a distribution from the plan shall have a right to receive a distribution in cash.

(4) **Put option period.**-- An employer shall be deemed to satisfy the requirements of paragraph (1)(B) if it provides a put option for a period of at least 60 days following the date of distribution of stock of the employer and, if the put option is not exercised within such 60-day period, for an additional period of at least 60 days in the following plan year (as provided in regulations promulgated by the Secretary).

(5) **Payment requirement for total distribution**.--If an employer is required to repurchase employer securities which are distributed to the employee as part of a total distribution, the requirements of paragraph (1)(B) shall be treated as met if--

(A) the amount to be paid for the employer securities is paid in substantially equal period payments (not less frequently than annually) over a period beginning not later than 30 days after the exercise of the put option described in paragraph (4) and not exceeding 5 years, and

(B) there is adequate security provided and reasonable interest paid on the unpaid amounts referred to in this subparagraph (A).

For the purposes of this paragraph, the term "total distribution" means the distribution within 1 taxable year to the recipient of the balance to the credit of the recipient's account.

(6) **Payment requirement for installment distributions**. --If an employer is required to repurchase employer securities as part of an installment distribution, the requirements of paragraph (1)(B) shall be treated as met if the amount to be paid, for the employer securities is paid not later than 30 days after the exercise of the put option described in paragraph (4).

(7) **Exception where employee elected diversification.--** Paragraph (1)(B) shall not apply with respect to the portion of the participant's account which the employee elected to have reinvested under section 401(a)(28)(B)